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CONCISE TREATISE
ON THE
LAW OF COVENANTS.

BY
GAWAYNE BALDWIN HAMILTON,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

SECOND EDITION.

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PREFACE

TO THE SECOND EDITION.



SINCE this book was first published, a great number of cases dealing with covenants have been decided. The covenants for title implied under the Conveyancing Act have been considered by the Court of Appeal in *Davis v. Sabin*, (1893) 1 Ch. A. 523. There have been numerous cases as to the liability of a lessee who has covenanted to pay rates and taxes, and it would seem that, if the words are wide enough, a lessee may make himself liable for charges for permanent improvements, at all events if he has more than a yearly tenancy. The principle upon which restrictive covenants will be enforced has repeatedly come before the Courts; and in *Formby v. Barker*, (1903) 2 Ch. A. 539, it has been held that a vendor who has sold all his land cannot assign the benefit of such a covenant, and that a breach after his death cannot be enforced by his executors.

Joint and several covenants, and covenants in restraint of trade, have also been the subject of decisions of the House of Lords.

The arrangement of the First Edition has been adhered to, but with the exception of the Appendix, almost the whole of the book has been rewritten, and the cases noted up to July, 1904. References to all the reports are given in the Table of Cases.

G. B. H.

14, OLD SQUARE, LINCOLN'S INN,
August, 1904.

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LAW OF COVENANTS.

CHAPTER I.

WHAT IS A COVENANT AND HOW CREATED.

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A COVENANT is an agreement in a deed by which one person engages, either expressly or by implication, to do something beneficial, or to abstain from doing something prejudicial to another, or engages that some act has or has not been done (a). Definition.

The person who enters into the engagement is called the covenantor, the person with whom the engagement is made is called the covenantee.

No particular technical words are requisite towards How created.

(a) Cf. *Shep. Touch.* 160; *Cru. Dig. Deed, Chap. XXVI.* p. 367; *Bac. Abr. Covenant, Vol. I.* p. 526.

making a covenant (*b*). It is enough if the intention of the parties mutually to contract is apparent from the general scope of an instrument under seal (*c*). "Neither the word 'covenant' nor the word 'agreement' is necessary to an action of covenant, but a deed under hand and seal testifying an agreement" (*d*).

And the word *covenant* may be used in an agreement in a sense other than its strict legal meaning; thus to effectuate the intention of the parties "covenant and condition" have been construed to mean "contract and stipulation" (*e*).

Covenants have been held to be created by the use of the words: "I oblige myself to pay" (*f*), "I am content to give" (*g*), "acknowledge accountable" (*h*), "resolve and agree" (*i*), "and shall repair" (*k*), "I have in my custody a writing obligatory, and I will be ready at all times when I shall be required to redeliver the same" (*l*).

"There needs not formal and orderly words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing [sealed and delivered], in what words soever it be set down for anything to be or not to be done, the party to or with whom the promise or agreement is made may have this action on breach of the agreement. And therefore, if these words be inserted in a deed amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber, or

(*b*) *Lant v. Norris*, 1 Burr. 290, per Lord Mansfield; cf. *Money-penny v. Money-penny*, 3 De G. & J. 572.

(*c*) *Wood v. Copper Miners' Company*, 7 C. B. 906.

(*d*) *Holles v. Carr*, 3 Swan. p. 647; cf. *Com. Dig. Covenant*, A. (1).

(*e*) *Hayne v. Cummings*, 16 C. B.

N. S. 421.

(*f*) *Norrice's Case*, Hardres, 178.

(*g*) 3 Leon. 199, pl. 199.

(*h*) *Brice v. Carr*, 1 Leon. 47; 1 Keb. 155.

(*i*) *Ellison v. Bignold*, 2 J. & W. 510.

(*k*) *Bret v. Cumberland*, Cro. Jac. 399.

(*l*) *Bac. Abr. Cov.* p. 528.

‘that the lessee shall scour ditches, provided always that the lessor do carry away the earth,’ these are good covenants on both sides” (m).

A declaration of intention in a deed may amount to a covenant. In *Rigby v. Great Western Railway Company* (n), by an indenture made between the company and the plaintiffs, refreshment-rooms at Swindon were demised to the plaintiffs for ninety-nine years at a rent of 1*d.*, and the plaintiffs covenanted to complete the rooms, keep them in repair, sell refreshments at a price fixed by the directors, &c., and the company covenanted to buy, if Swindon ceased to be used as a stoppage-place for refreshments, and “it was declared to be the intention of the company and the understanding of the plaintiffs, that in consideration of the outlay to be incurred by the plaintiffs, all trains carrying passengers, not goods trains or to be sent express for special purposes, which should pass the Swindon station, should, unless in case of emergency or unusual delay arising from accident, stop there for refreshment for a reasonable time of about ten minutes, and the company engaged with the plaintiffs not to do any act which should have an effect contrary to the above intention.” It was held that “engaged” was equivalent to covenanted, and that the company covenanted that all trains not comprised in the exception should stop for ten minutes.

Declaration
of intention
in a deed.

An acknowledgment of a debt in an instrument under seal amounts to a covenant to pay it (o). But, where the acknowledgment is made for a collateral purpose, it will not have the effect of a covenant to pay, as when the main object is to give security (p).

Acknowledg-
ment of debt
may amount
to covenant.

A deed made between a company, Jackson (a director) and trustees recited that Jackson had acquired certain

(m) Shep. Touch. 162.

Milsome, L. R. 2 Eq. 573.

(n) 14 M. & W. 811; 10 Jur. 488.

(p) Courtney v. Taylor, 6 Man. & G. 851; Marryat v. Marryat, 28 Beav. 224; cf. Isaacson v. Harwood, L. R. 3 Ch. 225.

(o) Saltoun v. Houston, 8 Moore, 546; 1 Bing. 433; Saunders v.

collieries on behalf of the company, and that the money had been provided, £467,079 by the company, and £43,216 by Jackson for the benefit of the company, and the colliery was conveyed to the trustees to secure the £467,079 due to the company, and, secondly, the £43,216 due to Jackson. Holding collieries being *ultra vires*, their sale was directed by an Act of Parliament, and they were sold for less than £467,079. It was held that the only object of the deed was to make the collieries a security for the repayment of the debt to Jackson, and not to create a general or absolute debt of the company (*q*).

But not when
payment ac-
knowledged.

But when the deed contains an acknowledgment of payment, a recital of an agreement to pay will not amount to a covenant to pay (*r*).

The headnote in *Money Penny v. Money Penny* (*s*) is incorrect in stating that a covenant to pay an annuity is implied from a recital of seisin. The majority of the Lords decided in that case that there was an express covenant (*t*).

Exception
may amount
to a covenant.

An exception may amount to a covenant. Thus, where there was a covenant by a lessee during the term to plough, sow, manure, and cultivate the premises thereby demised (except the rabbit warren and sheep walk) in a regular and due course of husbandry, it was held that covenant lay against the lessee for ploughing the rabbit warren and sheep walk (*u*).

A recital of an agreement not to issue execution upon a judgment at a certain period amounts to a covenant not to do so (*x*).

(*q*) *Jackson v. North Eastern Railway Company*, 7 Ch. D. 573.

(*r*) *Morgan Patent Anchor Company v. Morgan*, 35 L. T. Rep. 811.

(*s*) 9 H. L. C. 114.

(*t*) *North British and Mercantile*

Insurance v. Clifford, W. N. (1903) 77.

(*u*) *Duke of St. Albans v. Ellis*, 16 East, 352; cf. *Cole's Case*, 1 Salk. 196.

(*x*) *Farrall v. Hilditch*, 5 C. B. N. S. 840; 7 W. R. 409; cf. *Barfoot v. Freswell*, 3 Keb. 465.

When the words do not amount to an agreement, or are merely conditional to defeat the estate, an action for covenant is not maintainable.

No covenant where words merely conditional.

If there are articles of agreement by indenture between A. and B., in which A. agrees that B. shall have a house in a street in London for certain years, provided and upon condition that B. shall receive and pay the rents of other houses in the same street mentioned in a schedule annexed to the indenture, and it is further agreed that B., for his labour in collecting the rents, shall have the overplus beyond a certain sum, this is not any covenant on the part of B. to bind him to receive and pay the rents, but the proviso and condition will only make the estate of B. void in the house (y).

A proviso may amount to a covenant. Thus, in *Brookes v. Drysdale* (z) there was a clause in a lease of a public-house, "Provided always, and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term shall be left with the solicitor of the ground landlord within two months of its date for the purpose of registration, and a fee of one guinea paid for its registration," and a power of re-entry in case of breach or non-performance of any of the covenants and other stipulations thereinbefore contained or referred to. The lessee agreed to assign to a purchaser who agreed to take it "subject to the yearly rent of £90 and the performance of the covenants thereby reserved and contained, such covenants being common or usual in leases of public-houses." The purchaser was held justified in refusing to complete on the ground that this was not a common and usual covenant, and was, at all events, a covenant within the contemplation of the agreement.

Proviso may amount to a covenant.

Where a strip of land was demised for a term of 1,000 years for the purpose of a canal, with a proviso that nothing

(y) 1 Bac. Abr. Cov. 529.

(z) 3 C. P. D. 52.

should prevent the lessors, their heirs and assigns, from using any of the land demised in like manner as they would have used the same in case the lease had not been granted, but so as not to injure the canal, it was held that the proviso operated as a covenant with the lessors as owners of the reversion, and ran with the reversion (*a*).

A covenant can only be created by deed.

A covenant can only be created by deed, but it may be as well by deed poll as by indenture, for the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him. But the party must be named in the deed poll (*b*).

A covenantee who has not executed a deed can sue on covenants contained in it (*c*).

"Covenant does not lie without a deed" (*d*); it cannot be grounded without writing, sealed and delivered, except by special custom, as in London (*e*).

Only a party to indenture could take benefit of covenant.

Though a covenant entered into with any person named in a deed poll is valid (*f*), a covenant in an indenture entered into with a person not a party could not be sued on by that person. Thus, where an indenture of lease was made between A. for and on behalf of B. on the one part, and C. on the other part (A. being authorized by writing of B. not under seal to grant the lease), and A. executed the deed in his own name, it was held that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B. (*g*).

8 & 9 Vict. c. 106.

But by 8 & 9 Vict. c. 106, s. 5, under an indenture executed after October 1, 1845, the benefit of a condition or covenant respecting any tenements or hereditaments may

(*a*) *Dynevor v. Tennant*, 13 App. Cas. 277.

(*b*) 4 Cru. Dig. 368.

(*c*) *Vernon v. Jefferys*, 2 Stra. 1146; *Morgan v. Pike*, 14 C. B. 473.

(*d*) *Metcalfe v. Rycroft*, 6 M. & S. 77, per Abbot, J.

(*e*) *Shep. Touch.* 162.

(*f*) *Green v. Hoare*, 1 Salk. 197; 1 Rol. Abr. 517.

(*g*) *Berkeley v. Hardy*, 5 B. & C. 355; cf. *Southampton v. Brown*, 6 B. & C. 718; *Ex p. Richardson*, 14 Ves. 187.

be taken, although the taker thereof be not named a party to the same indenture, and by the Judicature Act, 1873, debts and legal choses in action can now be assigned.

"If there is a contract for value, then, with the exception that I shall mention, no person who is not a party to the contract can enforce it. But there is an old established exception, that in a marriage settlement the children of the marriage can enforce it, although, of course, they could not by possibility be parties to the contract" (*h*).

Marriage settlements an exception.

A person who is not a party to a deed may covenant with one who is, and will be bound by executing the deed (*i*). "Why cannot a man oblige himself by deed, if there be express words, and he seals it . . . Where do you find a man cannot give without being a party?" (*k*).

"If a feoffment or lease be made to two, as to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, or the wife doth or doth not seal during coverture, and he or she that doth not seal doth notwithstanding accept of the estate, and occupy the lands conveyed or demised in these cases as touching all inherent covenants, as for payment of rent and the accessories thereof (as clauses of distress, re-entry, &c.), they are bound by these covenants as much as if they do seal the deed. So if a lease be made to A. for years or life, the remainder to B. in fee, and there is a rent reserved, or there be divers covenants on the part of the grantees, and B. doth never seal the deed or counterpart, yet if in this case he accept the estate after the death of A., he must pay the rent and perform all the covenants that are inherent. But *quære* of collateral covenants in the first case, for therein it seems the feoffee or lessee is not bound, and yet it is said if an indenture be made between A. of the one part, and B. and

A person takes the benefit of a deed. *Quære*, is he bound by covenants without execution?

(*h*) *Tucker v. Bennett*, 38 Ch. Div. 1, p. 10, per Cotton, L. J., and cf. *post*, p. 152.

(*i*) *Salter v. Kidgley*, Carth. 76; 1 Show. 58.

(*k*) 1 Show. 59, per Holt, C. J.

C. of the other part, and there is therein a lease made by A. to B. and C. on certain conditions, and B. and C. are bound to A. in the indenture in £20 to perform the condition, and B. only doth seal the deed, and not C., yet in this case, if C. accept of the estate he is bound by the covenants, and one of them cannot be sued without the other while both are living" (*l*).

This doctrine has been vigorously attacked (*m*), and it has been urged that two of the authorities cited by Coke (*n*) are actions for debt, and the third (*o*) is a case where a manor was leased to a man and his wife, and on the lessors suing on a covenant the writ was quashed, because the wife should not have been joined.

Since the Judicature Acts, however, the importance of the question has diminished. "If there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates, two questions are involved: (1) Is there a contract of which specific performance can be obtained? and (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question? It is to be treated as though before the Judicature Act there had been, first, a suit in equity for specific performance, and then an action at law between the same parties" (*p*).

In 1892, A. executed under seal an agreement with B. & Co. to take a yearly tenancy of an hotel, and covenanted at all times during the tenancy to purchase of B. & Co. or its successors in business all ale, beer, &c., sold or consumed on or off the premises. B. & Co. never executed the document. In 1899, B. & Co. sold all its property and the goodwill of the business to a brewery

(*l*) Shep. Touch. 178; Co. Lit. 231a.

8 (b), and 3 Hen. 6, c. 26.

(*o*) 45 Edw. 3, 11 and 12.

(*m*) Platt on Covenants, pp. 10—15.

(*p*) Manchester Brewery Company v. Coombs, (1901) 2 Ch. 608; 82 L. T. Rep. 347, p. 351, per

(*n*) Co. Lit. 231a, viz. 38 Edw. 3,

Farwell, J.

company, but A. refused to purchase beer, ale, &c., from that company, and bought from others. It was held that, although before the Judicature Acts the brewery company could not have sued in covenant or in *assumpsit*, yet, as A. would have no defence to an action for specific performance to compel him to take the legal estate, the brewery company was entitled to bring an action to restrain A. from committing a breach of the covenant (*p*).

A company did not execute a deed containing a restrictive covenant. The company took possession of the land by virtue of the deed, and the defendant who was sued on the covenant claimed under them. "The non-execution of the deed by the company only results in this—that their rights thereunder are merely equitable, because there is no legal covenant" (*q*).

Implied Covenants.

"There are some words which of themselves impart no express covenants, yet being made use of in certain contracts they amount to such, and are therefore called covenants in law, and will as effectually bind the parties as if expressed in the most explicit terms" (*r*).

Covenants
in law.

Thus there is a covenant for quiet enjoyment under the words "granted and demised," and a covenant for payment of rent under the words "yielding and paying" (*s*), and the word "let" has the same effect as demise in this respect (*r*).

By 8 & 9 Vict. c. 106, s. 4, the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, do not imply any covenant in law in respect of any

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| <p>(<i>p</i>) See note (<i>p</i>), preceding page.</p> <p>(<i>q</i>) <i>Formby v. Barker</i>, (1903) 2 Ch. A. 539, p. 547, per Williams, L. J.</p> <p>(<i>r</i>) Bac. Abr. Cov. 530.</p> <p>(<i>s</i>) Per Lord Eldon, <i>Iggulden v. May</i>, 9 Ves. at p. 330; and cf.</p> | <p><i>Burnett v. Lynch</i>, 5 B. & C. 609, qualified by <i>Humble v. Langston</i>, 7 M. & W. 517, but upheld by the Court of Exchequer Chamber in <i>Walker v. Bartlett</i>, 18 C. B. 845; <i>Mathew v. Blackmore</i>, 1 H. & N. 766; <i>Shep. Touch.</i> 184; Co. Lit. 384a (u) 1.</p> |
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tenements or hereditaments except so far as the words by force of any Act of Parliament imply a covenant.

The word "give," before this statute, in a feoffment implied a warranty or general covenant when an estate of frank tenement or inheritance passed by the deed, and was also by statute an express warranty during the life of the feoffor.

The word "grant" implies certain covenants for title, unless restrained or limited by express words, in conveyances to railway companies (*t*), and the words "grant, bargain, and sell" operate as covenants for title under certain of the Yorkshire Registry Acts (*u*).

Demise.

"If one make a lease for years of land by the words 'demise' or 'grant,' and there is not contained in the lease any express covenant for the quiet enjoyment of the land; in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come under him by title during the term. But where there is an express covenant in the deed for the quiet enjoying of the land, then the law will not make this implied covenant" (*x*).

"In *Bandy v. Cartwright* (*y*) the lease was by parol; it was held that a covenant for quiet enjoyment during the term would be implied, and further that such covenant was broken by a distress for a rentcharge granted before the parol demise by a predecessor in title of the lessor under whom he claimed by purchase. The reason for this decision is not given in the report. Probably this parol lease was made by the word 'demise,' or, in the absence of evidence, that was assumed to be the case. The decision was followed in *Hall v. City of London Brewery Company* (*z*). The weight of authority is in favour of the

(*t*) 8 & 9 Vict. c. 18, s. 132.

(*u*) 6 Anne, c. 35, s. 30; 8 Geo. 2, c. 6, s. 35.

(*x*) Shep. Touch. 165; cf. Nokes' Case, 4 Rep. 30b; Com. Dig.

Covenant A. 4; Viner's Abridgement, Covenant F.; Bacon's Abridgement, Covenant B.

(*y*) 8 Exch. 913.

(*z*) 2 B. & S. 737.

view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease" (a).

In *Hart v. Windsor* (b) Park, B., said: "It is clear that from the word 'demise' in a lease under seal the law implies a covenant, in a lease not under seal a contract for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let' or any equivalent words (Shep. Touchstone, 272) which constitute a lease have no doubt the same effect, but not more: Shep. Touchstone, 165, 167."

This was cited in *Mostyn v. West Mostyn Coal and Iron Company* (c).

"This statement of the law professes to be founded upon Sheppard's Touchstone. But in that book it is not said that the covenant is implied from any words sufficient to make a lease, only from certain words; nor does the implied covenant, according to that authority, extend to an eviction by title paramount, but it is only the ordinary limited covenant for quiet enjoyment" (d).

A covenant in law shall not be extended to make a man do more than he can (e), and where a covenant is implied from the use of the word "demise," its duration is limited to the duration of the term of the lessor.

Thus where tenant for life made a lease for years by demise and grant at a rent, without any warranty, and died during the term, and the remainderman entered on the termor, it was held that an action would not lie

(a) *Baynes & Co. v. Lloyd & Sons*, (1895) 2 Q. B. A. 610, p. 615, per Kay, L. J.

(b) 12 M. & W. 85.

(c) 1 C. P. D. 145.

(d) *Baynes & Co. v. Lloyd & Sons*, (1895) 2 Q. B. A. 610, p. 615, per Kay, L. J.

(e) *Bragg v. Wiseman*, Brownlow & Goldesborough, 22.

against the executors of the lessors, for the covenant in law expired with the term (*f*).

If a covenant is implied from the use of the word "let" it is equally limited to the duration of the lessor's interest (*g*).

In *Baynes & Co. v. Lloyd & Sons* (*h*) a lessor possessing a term of which eight and a half years were unexpired by deed sub-let for ten and a half years. The sub-lease did not contain any express covenant for title or quiet enjoyment, and did not contain the word "demise." The sub-lessee, on being evicted at the end of eight and a half years, brought an action for breach of implied covenants for title and for quiet enjoyment, but his action was dismissed.

Kay, L. J., referred to Sheppard's Touchstone (*i*), and said that the covenant implied from the word "demise" was one for quiet enjoyment, not a covenant for title. No authority is cited by Littledale, J., in support of his dictum that "the word 'demise' imports a covenant in law on the part of the lessor that he has good title and that the lessees should enjoy quietly during the term" (*k*). *Holder v. Taylor* (*l*), he said, is shortly reported, and, moreover, the report is not altogether consistent. And although Tindal, C. J., admitted somewhat doubtfully (*m*) that a covenant for title may be imported by the word 'demise' as well as for quiet enjoyment," it is put by Alderson, B., that it is a fallacy to say it imports two covenants; it imports one of which either want of title or eviction would be a breach (*n*). *Stranks v. St. John* (*o*) was a case decided on demurrer.

(*f*) *Swan v. Strausham, Dyer*, 257a. Cf. *Adams v. Gibney*, 6 Bing. 656.

(*g*) *Penfold v. Abbott*, 32 L. J. Q. B. 67.

(*h*) (1895) 2 Q. B. A. 610.

(*i*) *Shep. Touch.* 165.

(*k*) *Burnett v. Lynch*, 5 B. & C. 589, p. 609.

(*l*) *Hob.* 12.

(*m*) *Line v. Stephenson*, 4 Bing. N. C. 678, p. 683.

(*n*) *Ib.*, 5 Bing. N. C. 183, p. 184.

(*o*) L. R. 2 C. P. 376.

In *Dennett v. Atherton* (*p*), on a conveyance in fee to A., the purchaser covenanted with the vendor, B., not to permit the trade of seller of beer to be carried on on any part of the land, and A. afterwards demised for twenty-one years a building on part of the land. The lessee covenanted not to carry on certain trades (not including that of a seller of beer); the lessor covenanted for quiet enjoyment, and the lessee assigned to the plaintiff, who, without notice of A.'s covenant with B., fitted up the premises as a beer-shop. The plaintiff, on being restrained by injunction from using his premises as a beer-shop, sued A. on the implied covenant for quiet enjoyment, but it was held that the express covenant for quiet enjoyment excluded any implied covenant.

On letting furnished houses there is an implied covenant, or rather condition, that they are reasonably fit for habitation (*q*).

There is, however, no implied agreement that they shall continue fit for habitation during the term (*r*).

But where a partly furnished house and garden with a few acres of land was let for five years, it was held that there was no implied covenant that the house was fit for habitation (*s*).

The covenant for payment of rent implied in the *reddendum* of a lease does not arise till entry (*t*).

It will be found that where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance as if the instruments had contained express covenants to perform them (*u*).

Covenant implied from recital.

(*p*) L. R. 7 Q. B. 316.

(*q*) *Smith v. Marrable*, 11 M. & W. 772; *Wilson v. Finch Hatton*, 2 Exch. Div. 336; *Harrison v. Malet*, 3 Times Rep. 58; *Charsley v. Jones*, 53 J. P. 280.

(*r*) *Sarson v. Roberts*, (1895) 2 Q. B. A. 395.

(*s*) *Chester v. Powell*, 52 L. T. Rep. 722.

(*t*) 1 Burr. 125.

(*u*) *Aspdin v. Austin*, 5 Q. B. 671, per Lord Denman, p. 683.

In *Barfoot v. Freswell* (x), there was a recital that before the sealing of the indenture it was agreed on consideration that the plaintiff should have a third part of the coal digged. On demurrer it was excepted that here was no covenant to pay the third part, but a recital of agreement to have it. But by Hales, C. J., "were it but a recital that before the indenture they were agreed, it is a covenant; and so to say 'whereas it was agreed to pay £20,' for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act *in pais*, when it is declared by deed it is now a covenant by the indenture."

But a covenant to perform an act will not necessarily be implied from the fact that the act was within the contemplation of the parties. Thus, a building agreement contemplates the acquisition of a triangular piece of land by the lessor, but it was held that no covenant by him to acquire it could be implied (y).

"The distinction between covenants implied by operation of law and express covenants is that express covenants are taken more strictly. A man may without consideration enter into an express covenant" (z).

By grantor
not to deroga-
te from
grant.

A covenant is implied by a grantor or assignor to do nothing in derogation of his deed. Thus, where a debt was assigned by deed to C. with power to sue in the name of the assignors, and C. obtains a *capias* against the debtor to hold him to bail, and one of the assignors caused the sheriff to discharge the debtor, he was held liable on the implied covenant in the deed to do nothing in derogation of his grant (a).

There is an implied obligation on the part of a lessor

(x) 3 Keb. 465, cited *Farrall v. Hilditch*, 5 C. B. N. S. 840; cf. *Severn v. Clark*, 1 Leon. 122; *Johnson v. Proctor*, Yelv. 175; *Browning v. Wright*, 2 B. & P. 13.

(y) *Re Cadogan and Hans Place*

Estate, 73 L. T. Rep. 387.

(z) *Shubrick v. Salmond*, 3 Burr. 1639, per Lord Mansfield.

(a) *Gerard v. Lewis*, L. R. 2 C. P. 305; cf. *Seddon v. Senate*, 13 East, 63.

not to use his adjoining property so as to interfere with the stability of the property which he has let (*b*).

Where a man grants a house in which there are windows, neither he nor any one claiming under him can stop up the windows or destroy the lights (*c*).

"The grant of an easement of this kind is, properly speaking, an implied covenant by the grantor not to use his land so as to injure the rights of D. (the grantee) and those claiming under him" (*d*).

Where the owner of building land conveyed a plot with a house erected on it, and afterwards built on land reserved by him so as to obstruct the lights of the house, he was, under the circumstances, held liable in damages for the obstruction. In this case the *prima facie* right of the grantee not to have his light obstructed was displaced by his knowledge at the time of the conveyance that the grantor was about to build (*e*).

Where B., the owner in fee of building land, agreed to grant a lease of a plot to A.'s predecessor in title when a house of a specified description was erected on it, and a house was built and a lease granted accordingly, it was held that A. was entitled to restrain purchasers of adjoining plots from B. from building so as to obstruct her lights (*f*).

No action, however, lies for mere passive negligence or omission rendering the grant useless. Thus, where a lease was made of a house and piece of land, except the land on which a pump stood, with the use of the pump, it was held an action of covenant did not lie against the lessor for not repairing it, but that the lessee was entitled to repair the pump (*g*); but it would be a breach of covenant in such a case for the lessor to remove the pump (*h*).

Does not
extend to
neglect.

(*b*) *Grosvenor Hotel Company v. Hamilton*, (1894) 2 Q. B. 836.

(*c*) *Allen v. Taylor*, 16 Ch. D. 355.

(*d*) *Birmingham Banking Company v. Ross*, 38 Ch. Div. 295, p. 312, per Lindley, L. J.

(*e*) *Broomfield v. Williams*, (1897) 1 Ch. A. 602.

(*f*) *Pollard v. Gare*, (1901) 1 Ch. 834.

(*g*) *Pomfret v. Riccroft*, 1 Wms. Saund. 320.

(*h*) *Rhodes v. Bullard*, 7 East, 116.

Where a messuage and the use of a pump in the yard *whilst the same should remain there* jointly with the defendant, the plaintiff paying half the repairs, was demised by the defendant to the plaintiff, it was held that the defendant could remove the pump without breach of covenant (i).

Where a trustee has executed the deed appointing him a trustee, and has misapplied trust money, no covenant to repay the same is implied, and the debt is not a specialty debt (j).

In an assignment of a lease a covenant is implied to indemnify the original lessee against future breaches (k).

To carry on business.

Where a news agency business was sold for £2,500, payable by instalments, the amount of which were contingent on the profits of the business, a covenant to carry on the business was held to be implied (l).

In *McIntyre v. Belcher* (m), an agreement for the sale of the goodwill of a medical practice provided that the purchaser would for three years pay one-fourth of the earnings and receipts in each year, provided the earnings and receipts should amount to £300. It was held that the nature of the stipulated payments made it necessary that the business should be carried on, and that by wilfully incapacitating himself from doing so the purchaser broke his contract.

"I look on the law to be that if a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative" (n).

An insurance company covenanted with C. D. for valuable consideration to appoint him their agent at G.,

(i) *Rhodes v. Bullard*, 7 East, 116.

(j) *Holland v. Holland*, L. R. 4 Ch. 449.

(k) *Moule v. Garrett*, L. R. 7 Exch. 101.

(l) *Telegraph Despatch Company v. McLean*, L. R. 8 Ch. 658.

(m) 14 C. B. N. S. 654.

(n) *Stirling v. Maitland*, 5 B. & S. 840, p. 852, per Cockburn, C. J.

together with A. B., and that if A. B. should be displaced from the agency they would pay C. D. a certain sum. The company transferred its business to another company, wound up its affairs, and dissolved. It was held that this was a displacement of A. B. within the meaning of the covenant (*n*).

"In all these cases there was the element of a wilful act on the part of the person against whom relief was sought, which incapacitated him from carrying out that covenant which he had clearly entered into for making particular payments (*o*).

On a sale of a patent, no agreement to keep the patent on foot can be implied, although part of the consideration for the sale was a royalty on articles sold (*o*).

Where a lessee of a public-house covenants to purchase of his lessor all beer to be sold or consumed on his premises, a covenant by the lessor to supply him with such kinds of beer as he requires would seem to be implied (*p*).

In such a case a covenant to supply goods of a marketable character is implied (*q*).

(*n*) *Stirling v. Maitland*, 5 B. & S. 840.

(*o*) *Re Railway and Electric Appliances Company*, 38 Ch. D. 597, p. 605, per Kay, J.

(*p*) *Edwick v. Hawkes*, 18 Ch. D. 199.

(*q*) *Holcombe v. Hewson*, 2 Camp. 391; *Luker v. Dennis*, 7 Ch. D. 227.

CHAPTER II.

CONSTRUCTION.

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Same in all
Courts.

EVEN before the Judicature Acts the construction of covenants was the same in all Courts. “A Court of Equity cannot make an agreement for the parties, it can only explain what their true meaning was, and that is also the duty of a Court of Law” (a).

“But though it is clear the construction of such a covenant must be the same both in law and equity, I can conceive a number of cases in which, admitting the operation is to be the same in law and equity, a Court of Equity would reform the covenant, and introduce another covenant, of which it might be equally predicated that the construction would be the same in law and equity” (b).

(a) *Hotham v. East India Company*, 1 Doug. 277, per Lord Mansfield; cf. *Jalabert v. Duke of*

Chandos, 1 Eden, 376.

(b) *Iggulden v. May*, 9 Ves. 333, per Lord Eldon.

And equity will relieve against a strict performance upon equitable circumstances and no wilful default (c).

"A covenant, being part of a deed, is subject to the general rules established for the construction of deeds, as (i.) to be always taken most strongly against the covenantor, and in favour of the covenantee; (ii.) to be taken according to the intent of the parties; (iii.) to be construed *ut res magis valeat quam pereat*; and (iv.) when no time is limited for its performance, it must be done within a reasonable time" (d). Part of deed.

"It is certainly true that the words of a covenant are to be taken most strongly against the covenantor" (e). Construed most strongly against covenantor.

When two of the provisional directors of a railway company covenanted by an agreement under seal on the passing of their bill to pay a landowner, who had previously opposed its passing, £120 per acre for all land of his taken, and £3,000 in compensation for all general damage to his estate, and the landowner thereupon acceded to the bill, it was held that he was entitled to £3,000, although the railway had not been constructed, and no actual damage had been done to his land (f).

When a lessee covenanted to pay £10 extra if he got possession of a piece of land, the title to which was disputed, he was held liable, although he had to pay rent for the land to a third party (g).

"The rules of construction applicable to covenants are so well known that it is hardly necessary to cite authorities to show that every covenant is to be expounded with regard to its context; that such exposition must be upon the whole instrument, *ex antecentibus et consequentibus*, and according to the reasonable sense and construction of the words (h). In conformity with these rules, and in support

(c) *Eaton v. Lyon*, 3 Ves. 692.

(d) 4 Cru. Dig. p. 369.

(e) *Browning v. Wright*, 2 Bos. & P. 24, per Lord Eldon; cf. *Warde v. Warde*, 16 Beav. 103.

(f) *Bland v. Crowley*, 6 Exch. 522.

(g) *Heath v. Baker*, Ca. t. Hardwicke, 319.

(h) *Plowd.* 329.

of the apparent intent of the parties, covenants in large and general terms have been frequently narrowed and restrained" (i).

In *Combe v. Jones* (k), it was held that a covenant that, so long as A. should continue and be in actual receipt of the profits of a rectory, he would pay a yearly sum during the life of the rector by two half-yearly payments, must be construed as a covenant for the payment of such sum while the covenantor was in receipt of the profits during the life of the rector, and not whilst he was in receipt of profits.

Construction
must be
reasonable.

Where a man covenanted to pay a sum of money immediately upon demand, it was held that the word "immediately" must receive a reasonable construction (l). "It could not have meant that the plaintiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place."

It is no defence to an action for non-performance of a covenant, such as to build a house, that the house remained unbuilt, with the plaintiff's knowledge, up to a certain date, and that a reasonable time has not since elapsed (m).

Where the mortgagors were, under the terms of a mortgage deed, to remain in possession and manage the mortgaged property until default in payment upon demand in writing in manner specified, and such demand was made on the wife of one of the mortgagors by a person representing himself as the mortgagees' agent, it was held that non-payment before the mortgagors had an opportunity of inquiring into the truth of the alleged agency did not constitute default, and that the mortgagees were liable to the mortgagors in substantial damages in

(i) *Iggulden v. May*, 7 East, 241,
per Lord Ellenborough.

(k) 2 Chit. 700.

(l) *Toms v. Wilson*, 4 B. & S.
442; cf. *Brighty v. Norton*, 3 B.

& S. 305; *Doe v. Sutton*, 9 C. & P.
706; *Burgess v. Boetifeur*, 7 M. &
G. 481, p. 494.

(m) *Fisher v. Ford*, 4 Jur. 1034.

an action of trespass for entering upon possession of the mortgaged property on such non-payment (*n*).

Onerous covenants, such as those restraining lessees from alienation without licence, have always been construed with the utmost jealousy to prevent the restraint from going beyond the express stipulation (*o*). Onerous covenants strictly construed.

In construing a covenant not to carry on any offensive trade or business on the premises demised, much will depend on the situation of the premises, and whether such trade as that complained of was carried on there at the time of the demise (*p*). Restrictive covenants.

In *Kimber v. Admans* (*q*), land was sold subject to a "House." covenant that "no house shall be erected on any part of the four plots of less value than £500," and that "not more than ten houses shall be erected on the said four plots." The plaintiff had bought two of the plots, and the defendant the two remaining plots. The defendant proposed to erect four blocks of residential flats, each block consisting of two flats on the ground floor and two flats on the first floor. It was held that each block of four flats constituted only one house, there being no context to cut down or alter the popular interpretation of the word.

A building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constitutes two houses within the meaning of a covenant not to erect more than one house on the site (*r*).

"It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of the common staircase. In the present case there is no internal communication whatever. It is merely a case of one house

(*n*) *Moore v. Shelley*, 8 App. Ca. 285.

(*o*) *Church v. Brown*, 15 Ves. 258, p. 265.

(*p*) *Gutteridge v. Munyard*, 7 C.

& P. 129; 1 M. & R. 334.

(*q*) (1900) 1 Ch. A. 412; but cf. *Rogers v. Hosegood*, (1900) 2 Ch. A. 388.

(*r*) *Ilford Park Estates, Limited v. Jacobs*, (1903) 2 Ch. 522.

superimposed on another from which it is divided horizontally, while in the ordinary case of semi-detached houses the division is vertical" (s).

The erection of a stable upon a plot of ground in such a position that there was still room to erect a dwelling-house of a certain stipulated value upon the plot, was held no breach of a covenant to build a private dwelling-house of a certain minimum value (t).

Specific term
not extended
by subsequent
general term.

It is a general rule of construction in all instruments that where a specific term is used in the first instance it shall receive no extension by a subsequent general term (u).

"Nuisance."

In *Harrison v. Good* (x) a vendor of land took from the purchaser a covenant that he would not do or suffer to be done on the premises, or any part thereof, anything which should be a nuisance to the vendor or his tenants, or the occupiers or owners of the adjoining property or the houses to be built thereon. The purchaser immediately re-sold, and each of the sub-purchasers entered into a covenant not to do or suffer to be done on any of the premises anything which would or might be deemed a nuisance to the original vendor, or the occupiers or proprietors for the time being of the adjoining property or the houses to be built thereon. In the latter covenant "adjoining" was held to mean the property adjoining each lot, "nuisance" was restricted to its technical sense, and the establishment of a national school was held not to be a legal nuisance.

In *Tod-Heatly v. Benham* (y), however, the correctness of the limitation of "nuisance" to "legal nuisance" in *Harrison v. Good* (x) was doubted. That was an action brought by the reversioner of premises in the Old Brompton

(s) *Ilford Park Estates, Limited v. Jacobs*, (1903) 2 Ch. 526, per Eady, J.

(t) *Russell v. Baber*, 18 W. R. 1021.

(u) *Jones v. Thorne*, 1 B. & C.

719; *Archbishop of Canterbury's Case*, 2 Rep. 66; *Countess of Bridgwater v. Duke of Bolton*, 6 Mod. 107.

(x) L. R. 11 Eq. 338.

(y) 40 Ch. Div. 80.

ton Road and by some photographers who were tenants on his estate to restrain breach of a covenant not to carry on certain specified trades "or any other noisome or obnoxious or offensive trade or business," and against any act, &c. "to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring or adjoining houses." A hospital called the Queen's Jubilee Hospital had been opened. It was held that "neighbouring or adjoining" included houses which were not situated on the lessor's estate, and that though the hospital was carried on in the most careful manner, a reasonable apprehension of risk of infection was an annoyance within the covenant, and an injunction restraining the user of the premises as a hospital was granted, although no pecuniary damage was shown.

A covenant not to carry on upon the demised premises "any trade, business, or dealing whatsoever or anything of the nature thereof, or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises," has been held to prohibit the user of the premises as a throat and chest hospital for poor persons, where small payments were made by the patients according to their means (z).

The lessee of a plot in a building estate covenanted not to erect or build thereon any building except a stable, &c., and also not to do anything that might be an annoyance or nuisance to any tenant of the lessor. On a house being erected on an adjoining plot 20 feet from the lessee's boundary, the lessee put up a trellis-work screen 12 feet high on the boundary wall. It was held that the screen was a breach of the covenant against building, and was also a breach of the covenant against annoyance (a).

A covenant to use land for the purpose of a private School. dwelling-house only, and not for trade, has been held to be

(z) *Bramwell v. Lacy*, 10 Ch. D. 691.

(a) *Wood v. Cooper*, (1894) 3 Ch. 671.

broken by the establishment of a school for a hundred girls, supported by voluntary contributions (*b*).

A covenant not to "use, exercise, or carry on or permit or suffer to be used, exercised, or carried on, any trade or business of any description," was held to restrain a charitable institution called a "Home for Working Girls," where the inmates paid a small sum for board and lodging but no profit was derived (*c*).

A covenant not to use a house "for any trade or manufacture or for any other purpose than a private residence," is broken by using it as a boarding-house for scholars attending a school in the neighbourhood kept by the owner of the house in question. Such user practically converts the house from a "private residence" to the business of a boarding-house (*d*).

A covenant, after forbidding certain offensive and noisy trades and businesses, provided that there should not be carried on "any trade or business or occupation whatsoever whereby any injurious, offensive, or disagreeable noise or nuisance shall or may be occasioned or made." It was held that carrying on a boys' school in an ordinary and reasonable way would be within the wording of the covenant (*e*).

An agreement for the sale of a medical practice provided that the vendor should not practise or reside within a given radius, or otherwise directly or indirectly enter into competition with the purchaser. The vendor was called in by patients resident within the radius and visited them. He did not, however, solicit such patients, and they stated that they would in no event have called in the purchaser. It was held that the competition contemplated by the agreement was not confined to active competition, and that

(*b*) *German v. Chapman*, 7 Ch. Div. 71.

(*c*) *Rolls v. Miller*, 27 Ch. Div. 71.

(*d*) *Hobson v. Tulloch*, (1898) 1 Ch. 424.

(*e*) *Wauton v. Coppard*, (1899) 1 Ch. 92.

the acts of the vendor constituted an infringement of the covenant (*f*).

But where, on the sale of a medical practice, the vendor covenanted not to "set up in practice" within two miles of the house at which he carried on the business sold, it was held that he did not break the covenant by attending former patients at their request within that distance (*g*).

A covenant not to carry on certain specified businesses (which did not include a slaughter-house) or any other noxious, noisome, or offensive business, was held not to prevent the use of the premises as a slaughter-house, as it could not be inferred that the business would necessarily be offensive (*h*). Slaughter-house.

A fish-frying business is not necessarily an offensive business within sect. 112 of the Public Health Act, 1875 (*i*). But the business of fish-frying, having regard to the locality and the manner in which it is carried on, may be an offensive trade, and a contravention of a covenant not to use premises "as a public-house or beer-shop, or for carrying on any offensive trade whatsoever" (*k*). Fish-frying business.

A covenant by a lessee not to carry on the trade of a butcher on the premises is broken by selling raw meat retail, although no beasts are slaughtered there (*l*).

A covenant not to "carry on a noisome or offensive trade" has been held not to prevent the premises from being used for depositing quantities of lucifer matches, whereby the premises were rendered so dangerous as not to be insurable against fire, the word "dangerous" not being in the covenant (*m*).

Where B. demised an eating-house for a term of twenty-

(*f*) *Rogers v. Drury*, 57 L. J. Health *v. Boyton*, 52 L. T. Rep. Ch. 504. 99.

(*g*) *Robertson v. Buchanan*, 90 L. T. Rep. 390. (*k*) *Duke of Devonshire v. Brookshaw*, 81 L. T. Rep. 83.

(*h*) *Rapley v. Smart*, W. N. & Ald. 617. (*l*) *Doe d. Gaskell v. Spry*, 1 B.

(1894) p. 2. (*m*) *Heckman v. Isaacs*, 6 L. T.

(*i*) *Braintree Local Board of Rep.* 285.

one years, and covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating-house, provided always that the covenant should be binding only on B., and not on his heirs, executors, administrators, or assigns. Subsequently B. let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without B.'s license. The first lease was subsequently assigned to the plaintiff and the second to G. The plaintiff then brought an action against B. and G. to restrain G. from carrying on the trade of an eating-house on the premises comprised in the second lease, and to restrain B. from permitting him to do so. It was held that B.'s covenant was not broken by G.'s carrying on the business of an eating-house (*n*).

In *Fitz v. Iles* (*o*), the defendants were bound by a covenant in the lease of their house not to use the same as a coffee-house. The defendants were dealers in tea, coffee, and other groceries; but they proposed, as ancillary to their business and for the convenience of customers, to sell light refreshments, consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches and pork pies, to be consumed on the premises. They were restrained from doing so by injunction.

In *Ashby v. Wilson* (*p*), the defendant, the owner of a row of houses, let No. 3 to H. as a shop for carrying on a specified business. The lessee covenanted to use the premises for that business only, and the lessor covenanted not to let any of the other houses for the purposes of the same business. The plaintiff was the assignee of H.'s lease, and continued the business. Afterwards W. let No. 1 to the defendant B., taking a covenant from B. to use the premises only for the purposes of another specified business. The defendant B. sold various articles which were com-

(*n*) *Kemp v. Bird*, 5 Ch. Div.
974.

(*o*) (1893) 1 Ch. A. 77.
(*p*) (1900) 1 Ch. 66.

prised in the plaintiff's business. It was held that the defendant had broken no covenant of his own, and was not bound to sue B. for the breach of his covenant at the request of the plaintiff, who was neither covenantee nor assignee of B.'s covenant.

A covenant not to "do any act, matter or thing, upon the demised premises which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor or to any of his tenants, or to any part of the neighbourhood," was held not to be broken by the opening of a public-house upon the premises (*q*).

A covenant not to use a house as a beer-house is not broken by the sale, under a licence, of beer by retail to be consumed off the premises (*r*).

A covenant that a piece of land should not for twenty years be used "as a site for any hotel, tavern, public-house, or beer-house, nor should the trade or calling of an hotel or tavern-keeper, publican, or beershop-keeper, or seller by retail of wine, beer, spirits or spirituous liquors be used, exercised, or carried on at or upon the same," was not enforced by injunction so as to restrain the sale of wines and spirits in bottle by a grocer in the course of his trade (*s*), and the case was distinguished from *Fielden v. Slater* (*t*), where the covenant was against the use of the house for the sale of spirituous liquor. The decision, however, was not that there was no breach of covenant, but only that there was no case for an injunction (*u*).

"Adjoining premises" do not include all the houses in

(*q*) *Jones v. Thorne*, 3 D. & R. 152; 1 B. & C. 715; cf. *Pease v. Coates*, 12 Jur. N. S. 684. 3 Q. B. D. 359; *London and Suburban Land Company v. Field*, 16 Ch. D. 645.

(*r*) *London and North-Western Railway Company v. Garnett*, L. R. 9 Eq. 26; *Holt and Company v. Collyer*, 16 Ch. D. 718; *Bishop of St. Albans v. Battersby*, 674. (s) *Jones v. Bone*, L. R. 9 Eq.

(*t*) L. R. 7 Eq. 523.

(*u*) 44 Ch. Div. 248, per Cotton, L. J.

a block of buildings, but are confined to the next door premises (x).

In *Briggs v. Thornton* (y), the landlord of an arcade containing shops agreed in writing, binding himself and his assigns, to grant to Briggs, a "fine art dealer," a lease of one of the shops for the term of twenty-one years, determinable on notice at the end of the seventh or fourteenth year, the lease to contain a covenant by the lessee not to carry on upon the premises any other trade or business than such as was therein specified, including that of an "artistic and heraldic stationer," and also a covenant by the landlord "not to let any other portion of the arcade for the trade or business hereinbefore mentioned to be carried on by the tenant." Subsequently the landlord let a stall forming part of another shop in the arcade to a "bookseller and stationer" on a tenancy determinable at three months' notice. The bookseller sold certain articles which were also sold by Briggs. He had notice of Briggs' agreement. On Briggs bringing an action against the landlord and the bookseller, to restrain the landlord from letting, and the bookseller from using, the stall for any of the purposes of the business comprised in Briggs' agreement, it was held that the landlord had committed a breach of his agreement not to let, for which he was liable in damages, but that as the covenant restrained "letting" only, and not "using," Briggs had no remedy against the bookseller, either by injunction or damages, and Romer, L. J., said, "It is clear from *Kemp v. Bird* (z), that in cases like this the Court ought not, on the ground of presumed intention, to extend a covenant such as this beyond what on the face of it is the purpose of it" (a).

Covenant to
pay addi-
tional rent.

In *Weston v. Metropolitan Asylum* (b), premises were

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| (x) <i>Vale & Son v. Moorgate Street and Broad Street Building Company</i> , 80 L. T. Rep. 487; <i>R. v. Hodges, Moo. & M.</i> 341; but cf. <i>Tod Heatly v. Benham</i> , 40 Ch. Div. 80, <i>ante</i> , p. 22. | |
| (y) (1904) 1 Ch. A. 387. | |
| (z) 5 Ch. Div. 974. | |
| (a) (1904) 1 Ch. A. 395. | |
| (b) 9 Q. B. Div. 404. | |

demised by the plaintiffs for a term, and the reddendum of the lease was "yielding and paying a yearly rent of £30, and a like yearly rent of £25, in case any of the trades, &c., hereinafter covenanted not to be carried on or done on the said premises shall be carried on or done." The lessees covenanted against carrying on certain specified trades, and the lease contained a condition of re-entry if the yearly rent of £30, or the further rent of £25, in case the same became payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained. It was held that the lease could not be construed to entitle the assignees of the lessees to carry on such a business on payment of the additional rent, and that the plaintiffs were entitled to re-enter if they chose to exercise their option to do so, instead of requiring the payment of the additional rent.

A covenant by the husband to settle after-acquired property of the wife bound him (before recent legislation) so far as he was able to carry it into effect.

Covenants to settle after-acquired property.

An agreement between husband and wife in an antenuptial settlement to settle after-acquired property is a covenant on the part of the wife as well as of the husband (c), unless so expressed as to relate only to the husband's acts (d).

Where wife an infant.

In *Stevens v. Trevor-Garrick* (e), an infant, being entitled on her marriage to the sum of £1,000, joined with her intended husband in assigning that sum to trustees to be held by them upon trusts for the benefit of herself, her husband and children. On attaining twenty-one she repudiated the settlement, and claimed to be entitled to the £1,000. It was held that, apart from the Married Women's Property Act, 1882 (f), there would have been a valid settlement by the husband. Sect. 19 of that Act provides that nothing in the Act shall interfere with any

(c) *Smith v. Lucas*, 18 Ch. Div. Div. 354.

531.

(e) (1893) 2 Ch. 307.

(d) *Dawes v. Tredwell*, 18 Ch.

(f) 45 & 46 Vict. c. 75.

settlement made or to be made. The result was that the property was bound by the husband's covenant.

In *Buckland v. Buckland* (g), an ante-nuptial settlement made between the intended husband, intended wife (an infant), and trustees, recited an agreement that property belonging to the wife and then in the hands of trustees should be settled. There was no express covenant on the part of the husband. It was held that a covenant by the husband to settle the property must be implied from the recital, and that the agreement would have bound the property apart from the Married Women's Property Act, 1882, and that on the true construction of that Act sect. 19 prevented sect. 2 from defeating the settlement.

In *Hancock v. Hancock* (h), an ante-nuptial settlement executed in 1870 contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife or any joint agreement or declaration to that effect. In 1883 the wife became entitled to a share of personalty, and it was held that this share was bound by the covenant, the effect of sect. 19 being so to modify the operation of sect. 5 that the persons interested under a settlement of the property of a married woman are not deprived of any benefit to which they would have been entitled if the Act had not been passed.

What property included.

Covenants to settle after-acquired property include property falling into possession during the coverture, though the wife had a reversionary or contingent interest therein at the time of the settlement (i), but not contingent reversionary interests which become vested, but do not fall

(g) (1900) 2 Ch. 534.

(h) 38 Ch. Div. 78.

(i) *Archer v. Kelly*, 1 Dr. & Sm. 300; *Re Clinton's Trusts*, L. R. 13

Eq. 295; *Blythe v. Granville*, 14 Sim. 190; *Brooks v. Keith*, 1 Dr. & Sm. 462; *Ex p. Blake*, 16 Beav. 463; *Spring v. Pride*, 4 De G. J. & S. 395.

into possession during the coverture (*k*), nor existing property in possession (*l*), even though unknown to the husband or trustees.

Where a married woman in whose settlement there was a covenant to settle future property, and who was entitled to property under her father's will, predeceased him, but by reason of her leaving issue the legacy did not lapse, it was held that the property was not within the covenant (*m*).

A covenant to settle after-acquired property will not oblige a wife to settle property coming to her in tail (*n*), nor will such a covenant bind property over which she has a general power of appointment, unless she appoints to herself (*o*).

But if, in default of appointment, the property is limited to the wife absolutely, it will be bound by the covenant, notwithstanding the wife's general power of appointment (*p*).

An assignment by the intended wife in the marriage settlement of her property and fortune, both present and expectant or future, did not comprise a sum of money which the husband presented to her long afterwards (*q*).

Under a gift by will to a woman of a legacy payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture shall be paid to her for her separate use when and as the same shall become due and payable, and so that she shall not have power to deprive herself of the benefit thereof by anticipation, the legatee is at the date

(*k*) *Re Michell's Trusts*, 9 Ch. D. 5.

(*l*) *Hoare v. Hornby*, 2 Y. & C. C. 129; *Otter v. Melville*, 2 De G. & Sm. 257; *Re Wyndham*, L. R. 1 Eq. 290; *Re Pedder*, L. R. 10 Eq. 585.

(*m*) *Pearce v. Graham*, 11 W. R. 415; 32 L. J. Ch. 359.

(*n*) *Hilbers v. Parkinson*, 25 Ch. D. 200.

(*o*) *Ewart v. Ewart*, 11 Hare, 276; *Ramsden v. Smith*, 2 Drew. 298, 306.

(*p*) *Re O'Connell, Mawle v. Jagoe*, (1903) 2 Ch. 574.

(*q*) *Coles v. Coles*, (1901) 1 Ch. 711.

of payment entitled to have the legacy paid to her, and the restraint on anticipation then ceases to operate. Accordingly a covenant by her contained in an antenuptial settlement executed before the death of the testator to settle after-acquired property is effectual to bind the property when transferred to her (*r*).

Voluntary
settlement.

A voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity (*s*).

"The assignment in *Kekewich v. Manning* (*t*) was not of an expectancy but of property," and the case has no bearing upon what was decided in *Meek v. Kettlewell* (*s*).

L., in 1893, granted to trustees the real estate, and assigned the personal estate to which she might become entitled in the event of the death of her brother and sister in her lifetime. The sister died in 1895, and L. received a share of her estate and handed it to the trustees. The brother died in 1902, and L. became entitled to his property. It was held that she could not be compelled to transfer it to the trustees (*u*).

Life interest.

Where a husband settled all the personal estate to which he was then or might thereafter become entitled, it was held that he was not bound to assign to the trustees his interest in a fund bequeathed to him for life, with remainder to his children (*x*).

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during coverture, the investments so made are not subject to the covenant (*y*).

By an agreement in contemplation of marriage, the intending husband agreed to settle the sum of £5,000 and any further moneys and property which he should receive

(*r*) *Re Bankes, Reynolds v. Ellis*,
(1902) 2 Ch. 333.

(*s*) *Meek v. Kettlewell*, 1 Hare,
464; 1 Ph. 342.

(*t*) 1 De G. M. & G. 176.

(*u*) *Re Ellenborough, Towry*

Law v. Burne, (1903) 1 Ch. 697.

(*x*) *St. Aubyn v. Humphreys*,
22 Beav. 175; *White v. Briggs*,
ib. p. 176 n.

(*y*) *Finlay v. Darling*, (1897)
1 Ch. 719.

and be entitled to under the will of his mother. The mother gave the husband a life interest, subject to forfeiture upon alienation or attempted alienation. It was held that this life interest was not comprised in the agreement, and that there had been no forfeiture (z).

Where a wife covenanted to settle all her after-acquired property, real and personal, whether in possession, reversion, or otherwise, and became entitled to certain annuities during the coverture, it was held that the annuities were not caught by the covenant (a).

Where there is a covenant to settle property of a certain specified value, the covenant refers to the value of the property, and not to the value of the covenantor's reversionary interest in it (b).

A wife who has covenanted to settle her after-acquired property will be compelled to settle property given to her for her separate use (c), and property to which she has become entitled since the passing of the Married Women's Property Act, 1882 (d); but in *Kane v. Kane* (e), where property "otherwise settled" was excepted from the covenant, the wife was held not to be bound to bring into settlement a legacy left her for her separate use.

In *Re Gerard* (f), a marriage settlement contained a covenant to settle after-acquired property of the wife of the value of £500 and upwards. The wife's father, by his will, bequeathed £4,000 to trustees, upon trust for such persons and in such sums and manner as the wife should, notwithstanding coverture, appoint, and in default of appointment, to her separate use, expressing his intention to enable

(z) *Re Crawshay*, (1891) 3 Ch. 176.

(a) *Re Dowding*, (1904) 1 Ch. 441; cf. *Townsend v. Harrowby*, 4 Jur. N. S. 353.

(b) *Re Mackenzie's Settlement*, L. R. 2 Ch. 345.

(c) *Re Allnutt*, 22 Ch. D. 275;

Scholesfield v. Spooner, 26 Ch. Div. 94; *Milford v. Peile*, 17 Beav. 602.

(d) *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. Div. 227.

(e) 16 Ch. D. 207; followed *Re Berens*, W. N. (1888) p. 131.

(f) W. N. (1888) p. 35.

her to defeat the covenant. The wife executed nine appointments of £450 each to her separate use. A summons was taken out to decide whether the £4,000 was payable to the wife or the trustees, and North, J., on the authority of *Bower v. Smith* (g), held that the wife was entitled to have it paid to her on her separate receipt.

In *Steward v. Poppleton* (h), the power of appointment given to the wife was subsequent to the vesting of her interest.

In *Re O'Connell* (i), a marriage settlement contained a covenant to settle any property exceeding £200 in value which the wife should become possessed of or entitled to. Property exceeding £200 in value was bequeathed in trust for such purposes as she should appoint, and in default, to her absolutely for her separate use. The wife executed deeds poll appointing several sums of £199 to herself, but Kekewich, J., held that the property was bound by the covenant.

Existing
property.

When the covenant to settle is expressed to extend to existing property not specifically mentioned, all property in possession or reversion, whether vested or contingent, and even though of such a nature that it cannot fall into possession during the coverture, will be bound.

In *Cornmell v. Keith* (k), there was a covenant in a marriage settlement to settle property to which the wife then was, or she, or her husband in her right, should during the coverture become entitled. At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her subject to the life interest of her husband. It was held that the wife's contingent reversionary interest in this fund was bound by the covenant.

(g) L. R. 11 Eq. 279.

(h) W. N. (1877) p. 29.

(i) (1903) 2 Ch. 574.

(k) 3 Ch. D. 767; cf. *Re Jackson's Will*, 13 Ch. D. 189; *Re Mackenzie's Settlement*, L. R. 2 Ch. 345.

A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives (*l*), but it will be so restricted if the wife survives (*m*).

"The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore *prima facie* is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death" (*n*).

In *Re Middleton's Will* (*o*), a marriage settlement made in 1853 contained a covenant for the settlement of all property which during the joint lives of a husband and wife should, by gift, devise, bequest, descent or otherwise devolve upon or vest in the wife, or in her husband in her right, and which should at the time when the same should respectively devolve upon or vest in her, or in him in her right, exceed the sum of £500. In 1866 the wife was left a legacy of £200 by a testator, who also left her a share of residue which exceeded £500, and it was held that she was only bound to settle the share of residue.

In *Re Davies* (*p*), a wife, married in 1877, became under the will of a testator, who died in 1880, entitled to a sum of £180, and also to an unascertained share of residue assumed to somewhat exceed £20. It was held that as between the husband and wife the wife took the £180 and share of residue under different titles, and that sect. 7 of the Married Women's Property Act, 1870, must be applied to each sum separately, and not to both in the aggregate.

In *Re Scott-Chad* (*q*), by a settlement made in 1887 the

(*l*) *Fisher v. Shirley*, 43 Ch. D. 290.

(*m*) *Re Coghlan*, (1894) 3 Ch. 76; *Dickinson v. Dillwyn*, L. R. 8 Eq. 546; *Carter v. Carter*, L. R. 8 Eq. 551.

(*n*) *Re Edwards*, L. R. 9 Ch. 97, p. 100, per James, L. J.

(*o*) 16 W. R. 1107.

(*p*) (1897) 2 Ch. 204.

(*q*) 84 L. T. Rep. 385; (1901) 1 Ch. 708.

intended wife covenanted that if at any time during the continuance of the marriage she should, at one and the same time, and from one and the same source, become, either by gift or will or otherwise howsoever, seised or possessed of or entitled to any real or personal property of the value of £500 or upwards, she would convey, assign, or assure the same to the trustees of the settlement. Under a codicil of a Mrs. Back the wife became entitled to a legacy of £500, and to a further legacy of £500 under a subsequent codicil. Each legacy was subject to legacy duty at the rate of 10 per cent. It was held that the sums must be aggregated and settled as they were acquired at one and the same time, the death of the testatrix, and from one and the same source, the testatrix.

A covenant to settle after-acquired property of the wife is not a provision of universal expediency. Where an agreement for a settlement provided that the settlement should contain certain specified provisions, and generally such other agreements, clauses and provisions "as are usually inserted in settlements of this kind," it was held that a covenant to settle after-acquired property was not a "usual" clause within the agreement (r).

Husband's
covenant.

In *Re Turcan* (s), T. covenanted in a marriage settlement to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage "by devise, bequest, purchase or otherwise." He afterwards effected some policies of insurance on his life, one of which was subject to a condition that it should not be assignable in any case whatever. It was held that the policies were property to which T. had during the marriage become entitled by purchase within the specific words of the covenant, and that the covenant was divisible, and could be enforced as to that property by a Court of Equity, and that the condition against assign-

(r) *Re Maddy*, (1901) 2 Ch. 820.

(s) 40 Ch. Div. 5.

ment did not prevent T. from dealing with the beneficial interest in the policy in accordance with his covenant.

"Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy" (t).

"Nothing can be more directly opposed to the plain reason and justice and policy of the law than that a man, whether in fraud or not, should on his marriage undertake that whatever fragment of property he may acquire during the coverture down to the smallest particular should be subject to the trusts which are supposed to be declared by this settlement. . . . There are many cases in which the policy of the law has been declared to be that a man cannot withdraw from his creditors, even in consideration of marriage, future property which he may acquire if at the time other persons, namely, his creditors, have the right to be paid out of the property" (u).

The rule in *Howe v. Earl of Dartmouth* (x) does not apply in the case of a settlement by deed.

By a settlement in 1841, £2,000 East Indian stock was settled in trust for the wife for life, then for the husband for life, and in the event, which happened, of there being no children of the marriage, upon trust to transfer one moiety to the husband and one moiety to the wife's father. There was a covenant to settle after-acquired property.

(t) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (2). cf. *Re Reis*, *Ex p. Clough*, W. N. (1904) 116.

(u) *Ex p. Bolland*, L. R. 17 Eq. 115, p. 120, per Bacon, C. J. But (x) 7 Ves. 137.

The wife's father, by his will, directed his residuary personal estate to be converted and held in trust as to one-third for the wife absolutely. The wife's father died in 1869, and the wife in 1900, so that her father's estate then became entitled to one moiety of the fund. It was contended that the whole of the reversionary estate ought not to be treated as capital, and that there ought to be an apportionment between capital and income, but it was held that there was no trust for conversion during the wife's lifetime (y).

(y) *Re Van Straubenzee*, (1901) 2 Ch. 779.

CHAPTER III.

CLASSES OF COVENANTS.

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Absolute or Conditional.

IN *Tielens v. Hooper* (a), an indenture granting the exclusive licence to use a patent for a term of years upon payment of certain royalties contained a covenant for the payment of the royalties, and proceeded : “ And it is hereby agreed that if it shall happen in any year during the continuance of the term that royalties, &c., shall not amount to £2,000, the defendant shall within fourteen days pay such a sum as, with the said royalty, will amount to £2,000 for that year ; or if the defendant shall at any time make default in payment of such sum as, with the said royalty, will amount to £2,000 for that year ; or if the defendant shall at any time make default in payment of such sum of money as aforesaid, it shall be lawful for the plaintiff by any

(a) 5 Exch. 830.

writing signed by him, and indorsed on the said indenture or the duplicate thereof, to declare that the said indenture, and the powers thereby granted, shall cease and determine." This was held not to be an absolute covenant on the part of the defendant to pay £2,000 a year during the term, but an alternative covenant enabling the plaintiff to put an end to the licence on non-payment of that sum by the defendant.

A covenant by directors of a railway company, in the event of their Bill passing, to take land for the purpose of the railway, and to pay for it within three months after the passing of the Bill, is valid and enforceable after the passing of the Bill; and a covenant to pay £2,000 for annoyance, &c. caused by the railway was held to be an absolute covenant, although no land being in fact required, no annoyance was caused (*b*).

Where a tenant covenanted to consume and convert into manure all turnips, &c., but if he sold any part (which he was at liberty to do), for every ton so sold to bring back a ton of manure, the covenant was held to be alternative, and the plaintiff, who had only set out the first part in his declaration, was not allowed to amend (*c*).

Where there was a covenant to pay £25,000 for the services of the plaintiff to a railway company, and also a covenant that, if the railway was not proceeded with, there should be another agreement, the covenant was held not to be absolute, but qualified by the second covenant (*d*).

Alternative stipulations, one of which impossible.

A. covenanted by deed within twelve months to pay the sum of £1,000, or transfer to B. £1,000 worth of fully-paid shares in a company to be formed by A., the capital of such company not to exceed £12,000. A. formed a company with a capital of £12,000, divided into 1,200

(*b*) *Taylor v. Chichester and Midhurst Railway Company*, L. R. 4 H. L. 628; cf. *Gage v. Newmarket Railway Company*, 18 Q. B. 457.

(*c*) *Richards v. Bluck*, 6 C. B. 437; 6 D. & L. 325.

(*d*) *Hemans v. Picciotto*, 1 C. B. N. S. 646; 5 W. R. 322.

shares of £10 each, of which 600 were preference shares with a dividend of 10 per cent. and 600 were ordinary. A. transferred 100 fully-paid ordinary shares in the company to B. before any contract for the issue of the shares as fully paid had been registered, but the contract was subsequently registered. The shares had no marketable value, and B. refused to accept a transfer, and claimed payment of £1,000.

It was held that the true construction of the language was that B. was to have £1,000 worth of shares, and that as it was admitted the shares were valueless he could not be compelled to take them, and was entitled to £1,000 (e).

An *affirmative* covenant is one by which the covenantor Affirmative. engages that something has already been performed, or shall be performed.

A *negative* covenant is one by which the covenantor Negative. engages that something has not been performed, or shall not be performed.

A negative covenant, *e.g.*, that a man will "from thenceforth leave off and desist from using and exercising the trade of a tailor with any of the customers named in the schedule" is never performed until it becomes impossible to break it (f), which impossibility can only happen in this case by the covenantor's death.

An affirmative covenant will not be enforced by injunction (g) unless it implies a negative (h).

(e) *McIlquham v. Taylor*, (1895) 47. 1 Ch. A. 53.

(f) *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156; 1 Sid. 461.

(g) *Hooper v. Brodrick*, 11 Sim.

(h) *London and South-Western Railway Company v. Gomm*, 20 Ch. Div. p. 562, per Jessel, M. R., *post*, p. 196.

Dependent and Independent Covenants.

Where
conditions
precedent.

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent" (i).

"The rules in *Pordage v. Cole* (k) are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties, for, as Lord Kenyon said (l), conditions are to be construed as either precedent or subsequent, according to the fair intention of the parties to be collected from the instrument, and technical words (if there be any to encounter such intention) should give way to that intention" (m).

The rules laid down in *Pordage v. Cole* (n) for the discovery of the intention are:—

"(1.) If a day be appointed for payment of money, or part of it, or doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for the performance of that which is the consideration of the money or other act" (o).

(i) *Bone v. Eyre*, 1 H. Bl. 273 n., per Lord Mansfield.

(k) 1 Wms. Saund. 320a.

(l) *Porter v. Shepherd*, 6 T. R. 668.

(m) *Roberts v. Brett*, 11 H. L. C.

337, p. 351, per Lord Westbury.

(n) 1 Wms. Saund. 320a.

(o) *Dyer*, 76a; *Thorpe v. Thorpe*, 1 Salk. 171; 1 Ld. Raym. 665; *Peeters v. Opie*, 2 Saund. 350; *Campbell v. Jones*, 6 T. R. 572.

In *Terry v. Duntze* (*p*), the plaintiffs, in consideration of a sum of £3,800, which the defendants covenanted to pay them by instalments as the building proceeded, covenanted to build a house for the defendants, and to finish it on or before a certain day. It was held that the finishing the house was not a condition precedent to the paying the money, but that the covenants were independent, and the plaintiffs might sue B. for the whole sum, though the building was not finished at the time appointed.

If it be agreed between A. and B. by deed that B. shall pay A. a sum of money for his lands, &c., on a particular day, these words amount to a covenant by A. to convey the lands, for agreed is the word of both; but it is an independent covenant, and A. may bring an action for the money before any conveyance by him of the land (*q*). Vendor and purchaser.

In *Mattock v. Kingslake* (*r*), A. agreed by articles under seal to sell, and B. to purchase, certain premises, and B. covenanted to pay on or before a fixed day as the consideration of such sale and purchase the sum of £11,200, with interest at £5 per cent. to the time of completion of the purchase, A. allowing thereon the same rate of interest for so much of the purchase-money as might be paid in the meantime, and B. agreed to pay for the conveyance and stamp. The acts of payment and of conveyance were held not to be concurrent, and the covenants to be independent.

In this case it is to be noticed that there was no question as to title, as it was admitted on the record that A. was seised in fee. It was the duty of the purchaser to prepare and tender the conveyance, as it would have been even if the contract had contained no express provision.

In *Dicker v. Jackson* (*s*), the performance of a contract under seal with respect to delivering an abstract within one month from the date thereof and deducing a clear title

(*p*) 2 H. Bl. 389.

(*r*) 10 A. & E. 60.

(*q*) *Portage v. Cole*, 1 Wms. Saund. 319.

(*s*) 6 C. B. 103.

was held not to be a condition precedent to a right to bring an action for non-payment of the purchase-money.

But in this case the defendant had gone into possession, and an abstract had been delivered, and the plaintiff alleged that he did perform, and was ready and willing to perform, the contract in all things. Contracts for the sale of land as a general rule come within Rule 4 or 5 (*t*), and the true construction of an agreement for sale is generally that the purchaser is not bound to pay the purchase-money until a good title is made out by the vendor (*u*).

Lessor and
lessee.

In *Jones v. Cannock* (*x*), the lessor covenanted within eighteen months of the date of the lease to build a new shed and stalls for feeding cattle, the whole of which was agreed to be left to the superintendence of the lessee and the lessor's son. It was held that the covenant to do the work within the period of eighteen months was an absolute one, and that the succeeding words were not a condition precedent to or concurrent with the covenant of the lessor.

Partnership.

The plaintiff and defendant agreed by deed to enter into partnership as surgeons until 1st January, 1846, the defendant agreeing to pay the plaintiff £800 and to be entitled to all the profits, and the plaintiff agreed after 1st January to introduce the defendant as his successor, and the defendant, in consideration of such introduction, agreed to pay the plaintiff £50 more on the 25th March, 1846. The covenants were held to be independent, and the introduction by the plaintiff to his patients of the defendant was held not to be a condition precedent to the payment of the £50 (*y*).

Coal mine.

The plaintiff conveyed to the defendant all the coal lying and being within and under certain premises, and the defendant covenanted to pay £40 for every statute acre of coal which should be found within or under the

(*t*) *Post*, p. 51.

(*u*) *E.g.*, *Manby v. Cremonini*,
6 Exch. 808.

(*x*) 5 Exch. 713; 3 H. L. C. 700.

(*y*) *Judson v. Bowden*, 1 Exch.
162.

said premises, and, until the said price or consideration for the coal should be fully paid, to pay £40 per annum by half-yearly payments on the 2nd January and the 2nd July, commencing from the date of the indenture, whether the whole of an acre of the said coal should be gotten in any such year or not, finding the coal was held not to be a condition precedent to the recovery of the £40 per annum (s).

In *Macintosh v. Midland Counties Railway Company* (a), Construction of railway.
the plaintiff, by an indenture dated the 19th December, 1837, covenanted with the defendants, in consideration of a sum of money, to make a railway before the 1st May, 1840; and, by indenture of the 23rd March, 1839, in consideration of £15,000, further covenanted, being provided with bars, chairs, &c., by the defendants, to complete the railway by the 1st June, 1840, or to pay £300 a day until completion (not exceeding £15,000 in all). It was held that the defendants were not bound to supply bars, chairs, &c., as a condition precedent to their right to sue on the covenant in the latter deed, or to deduct £7,500 for non-completion for twenty-six days after the 1st June.

“(2.) When a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance” (b).

Where by a charter-party the owner of a ship cove- Freight.
nanted to take on board the freighter's goods in London, and proceed with them to Montevideo, and deliver them to the freighter's agent, and receive from him another cargo, and, wind and weather permitting, deliver to the freighter in Great Britain, in consideration whereof the

(s) *Jowett v. Spencer*, 1 Exch. 647.

(a) 16 M. & W. 548.

(b) 1 Wms. Saund. 320b; Thorpe

v. Thorpe, 1 Salk. 171, 2nd resolution; 12 Mod. 462; 1 Ld. Raym. 665; 1 Lutw. 251; Dyer, 76a, pl. 30.

defendant covenanted to pay £670 per month for freight during the voyage to Montevideo and back to the port of discharge, and also pilotage, port charges, &c., "such freight, pilotage and port charges to be paid on the arrival and discharge of the ship at her destined port in Great Britain." The ship was detained in Africa on the voyage to Montevideo by persons unknown, and by them conducted to London, and, after being detained, given back to the plaintiff, who had some necessary repairs executed, and tendered her to the defendant, who refused to permit the ship to complete the voyage; it was held that, as the ship never arrived at her destined port, the freight never became demandable at law (c).

By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month for the term of six months at least, and so in proportion for less than a month or such further time as the ship might be detained in the service of the freighter until her final discharge or until the day of her being lost, captured, or last seen or heard of; such freight to be paid as follows, viz., so much as might be earned at the time of the arrival of the ship at her first destined port, within ten days next after her arrival, and the remainder at specified periods. The ship was lost on her outward journey, and it was held that her arrival at the first destined port was a condition precedent to the owner's right to recover any freight (d).

Renewable
lease—per-
formance of
covenants.

In *Bastin v. Bidwell* (e), the lessee covenanted to pay the rent and keep the premises in repair, and to paint the outside and inside at certain fixed periods; and the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his

(c) *Smith v. Wilson*, 8 East, 437. Ald. 17.

(d) *Gibbon v. Mendez*, 2 B. & (e) 18 Ch. D. 238.

lease. The lessee applied for renewal, but the lessor refused on the ground of breach of the covenant to repair, paint, &c., both at the date of the notice and at its expiration. It was held that the performance of covenants was a condition precedent to the lessee's privilege of having a new lease.

"(3.) Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of covenant on the part of the defendant without averring performance in the declaration" (f).

Independent where only go to part of consideration.

A. by deed conveyed to B. the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for life, and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy. B. covenanted that, *A. well and truly performing all and everything therein contained on his part to be performed*, he would pay the annuity. A. sued B. on this covenant, the breach assigned being non-payment of the annuity. B. pleaded that A. was not legally possessed of the negroes on the plantation. It was held that the plea was bad. The excuse for non-payment was that A. had broken his covenant as to part of the consideration—the stock of negroes—and it would be unreasonable to allow B. to keep the plantation and refuse to pay for it because A.'s title to a single negro was defective (g).

Where a person has received part of the consideration for which he entered into the agreement, it would be unjust that because he has not received the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and

(f) 1 Wms. Saund. 320b.

(g) Bone v. Eyre, 1 H. Bl. 273, n.; *nom.* Boon v. Eyre, 2 W. Bl. 1312.

Apprentice-
ship deed.

leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration (*h*).

By an indenture dated the 28th October, 1854, a boy of fifteen was apprenticed to the defendant for four and a half years, from the 30th August last past, and in consideration of £99 19s. the defendant covenanted to teach the boy the art of a chemist and druggist, and provide him with meat and drink. The defendant, in answer to an action for breach of this covenant, pleaded that the apprentice conducted himself in so improper, unfaithful, and dishonest a manner, and defrauded and robbed the defendant, so that it was unsafe for the defendant to continue him in his service. It was held that it afforded no justification for dismissing the apprentice, the covenants being independent (*i*).

But to an action of covenant against a master for not *teaching* his apprentice, it is a good plea that the apprentice would not be taught, and by his own wilful acts prevented his master from teaching him (*j*).

And where the agreement was to take an apprentice for three years to learn the business of a tea broker, and in consideration of £200 to teach him such business and pay him a salary, provided that he should obey all commands, and give his services entirely to the business during office hours, it was held that the proviso authorized the master to discharge the apprentice for disobeying his orders and habitually neglecting his duties, and refusing to give his services during office hours without just cause (*k*).

In *Campbell v. Jones* (*l*), it was agreed between C. and D. that in consideration of £500 C. should teach D. the art of bleaching materials for making paper, and permit him

(*h*) 1 Wms. Saund. 320c.

244.

(*i*) *Philps v. Clift*, 7 W. R. 295;
4 H. & N. 168; cf. *Winstone v.*
Linn, 1 B. & C. 460.

(*k*) *Westwick v. Theodor*, L. R.
10 Q. B. 224.

(*j*) *Raymond v. Minton*, 1 Exch.

(*l*) 6 T. R. 571.

during the continuance of a patent which C. had obtained to bleach such materials according to the specification, and C., in consideration of £250 paid, and a further £250 to be paid to him by D., covenanted that he would with all possible expedition teach D. the method of bleaching such materials. And D. covenanted that he would on a certain day, or sooner, in case C. should before that time have taught him the bleaching, pay C. the further sum of £250. The covenants were held to be independent, so that C. could sue D. for the further £250 without averring that he had taught him bleaching.

In *Stavers v. Curling (m)*, the plaintiff, the captain of a Southsea whaler, covenanted to proceed to the fishery, procure a cargo of sperm oil, return to London and deliver the cargo at his own cost, and the defendant covenanted, on the performance of the above-mentioned terms and conditions by the plaintiff, to pay him a certain proportion of the cargo. The covenants were held to be independent.

And where a plaintiff assigned a fish business to the defendant, and covenanted not to interfere in the business, and the defendant covenanted that, in consideration of the assignment and the covenants of the plaintiff, he would pay him an annuity of £250, it was held that a plea that the plaintiff had interfered in the business was bad in an action of debt for non-payment of the annuity (n).

In *Sibthorp v. Brunel (o)*, a deed recited that an intended railway would pass through the plaintiff's land, and contained a covenant by the defendant, within six months of the passing of the proposed Bill, and before the company should enter on the land, to pay to the plaintiff £4,000, and there was also a covenant by the plaintiff to convey so much of the property as was required for the

(m) 3 Bing. N. C. 355.

& P. 66; 4 Bing. 409.

(n) *Carpenter v. Crosswell*, 1 M.

(o) 3 Exch. 826.

construction of the railway; the covenants to pay the £4,000 and to convey the property were held to be independent.

And covenants by a contractor to supply gas to the satisfaction of the Chelsea vestry for the lighting of lamps, and by the vestry to pay a certain sum each year, were held independent, so that the contractor could recover the amount stipulated for gas, although he had not completely fulfilled his contract (*p*).

Farm.

In *Newson v. Smithies* (*q*), the plaintiff covenanted with the defendant to deliver up a farm on a certain day, and in the meantime to cultivate it on the fourcourse system, and that on the surrender he would deliver up an agreement to be cancelled, and surrender his unexpired interest in the farm, and, if the defendant required, execute any deed for further assurance, and the defendant covenanted, if the plaintiff delivered up the farm, &c., and performed the other covenants, he would pay for manure. The delivery up of the agreement was held not to be a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure. "It is a general rule that covenants are to be treated as independent rather than conditions precedent, especially when some benefit has been derived by the covenantor" (*r*).

Where a patent was assigned, and the vendor covenanted for the validity of the patent, and the purchaser covenanted to pay the purchase-money by instalments, the covenants were held to be independent (*s*).

In *Wood v. Copper Miners' Company* (*t*), an indenture recited that the plaintiff had erected a factory on certain premises, and that the defendant had advanced the plaintiff £2,500, and it was thereby agreed—(*i*) That the de-

(*p*) *London Gas Light Co. v. Chelsea Vestry*, 8 C. B. N. S. 215.

(*q*) 3 H. & N. 840.

(*r*) *Id.* per Pollock, C. B.

(*s*) *Cutler v. Bower*, 11 Q. B. 973.

(*t*) 14 C. B. 428.

defendant should grant to the plaintiff a lease of the factory and premises for twelve years at a peppercorn rent, and that the plaintiff should mortgage it to the defendant to secure the £2,500; (ii) that the coals consumed by the plaintiff should be purchased from the defendant, provided that the defendant should supply him with the quantity he should from time to time require; (iii) that the defendant should not be compelled to supply the plaintiff with more than 300 tons per week, and there were provisions as to notice if the defendant was unable to supply the required coal, and as to the payment of a rent of £100 in case the plaintiff ceased to use the defendant's coal. It was held that the defendant had covenanted to grant a lease to the plaintiff, and to supply him with the stipulated quantity of coal for twelve years, and that the granting the lease was not a condition precedent to the liability to perform the covenant to supply coal.

"(4.) Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred" (u).

In *Large v. Cheshire* (x), plaintiff declared in covenant on articles of agreement between him and the defendant, whereby the defendant covenanted to pay him such a sum, the plaintiff making to him a sufficient estate in such lands (*ipso faciente bonum statum*) before such a date, and that the defendant had not paid. It was held that "making a sufficient estate" was a condition precedent to the payment of the money, and the case was adjudged for the defendant, as the plaintiff should have averred performance thereof particularly in the declaration.

In *Duke of St. Albans v. Shore* (y), in articles of agreement under a penalty for the sale of lands, it was agreed that A., the seller, should take in part payment a conveyance of other lands belonging to B., the purchaser, and also

(u) 1 Wms. Saund. 320d.

(x) 1 Vent. 147.

(y) 1 H. Bl. 171.

that all timber trees which were then upon any of the estates should be valued by appraisers, and paid for by the respective purchasers at a given time; to an action of debt by A. against B. for the penalty on his refusal to complete the purchase, B. could plead that A. before the time cut down a certain number of trees, and thereby rendered it impossible for him to perform the agreement. To entitle himself to the penalty the plaintiff must show a strict performance on his part.

“(5.) Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act, and this particularly applies in cases of sales” (z).

In *Callonel v. Briggs* (a), there was an agreement that the defendant was to pay so much money six months after the bargain, the plaintiff transferring stock, and the plaintiff at the same time gave the defendant a note to transfer the stock, the defendant paying the money. Holt, C. J., said: “If either party would sue on this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender, for transferring in the first bargain was a condition precedent, and though there be mutual promises, yet if one thing be the consideration of the other, yet performance is necessary to be averred unless a certain day be appointed for the performance.”

But he who was ready, and offered to perform his part, but was discharged by the other, may maintain an action against the other for non-performance of his part (b).

(z) 1 Wms. Saund. 320d.

(a) 1 Salk. 112.

(b) *Jones v. Barkley*, 1 Doug.

659; *Kingston v. Preston*, *ib.*

669, n.; cf. *Ferry v. Williams*, 8

Taunt. 62.

In *Bowlby v. Bell* (c), A., a sharebroker, on the 28th July, 1845, contracted to sell to B. certain shares belonging to C., the scrip being sent to the company's office for registration. A. being unable to deliver the shares, B., on the 23rd September, purchased other shares at an advanced price, and claimed the difference from A., who paid the amount, after notice from C. not to do so, as brokers are personally liable on their contracts by the custom of the Hull Stock Exchange. A. claimed to be recouped by C. as for money paid to his use, but as the price of the shares had not been offered to C., and no transfer had been tendered to him for execution, the action was held not to be maintainable.

And where A. covenanted to sell a schoolhouse to B., and to convey it to him on or before the 1st August, 1797, and on or before the 24th June, 1796, to deliver possession, and in consideration thereof B. covenanted to pay A. £120 on or before the 1st August, 1797, the covenant to convey and that for payment of money were held to be dependent covenants, and A. could not maintain an action for the £120 without averring that he had conveyed or tendered a conveyance to B. (d).

In *Goodison v. Nunn* (e), A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on that day, and on failure, to pay £21. The covenants were held to be dependent, and A. could not recover the £21 without showing a conveyance on his part, or the tender of one.

(c) 3 C. B. 284.

(d) *Glazebrook v. Woodrow*, 8 T. R. 366.

(e) 4 T. R. 761.

CHAPTER IV.

COVENANTS FOR TITLE.

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How different from warranties. "COVENANTS for title have in modern practice supplied the place of warranties, from which they principally differ in this—that the remedy for the defect of title under a warranty was the recovery of other land of equal value, while the remedy at law upon a covenant is the recovery of pecuniary damages" (a).

The covenants entered into by a vendor were formerly

(a) 3rd Report of Real Property Commissioners, Davidson's Prec. Leases, 134 (3rd ed.).

five in number :—(1) That he is seised in fee ; (2) that he has power to convey ; (3) for quiet enjoyment by the purchaser, his heirs and assigns ; (4) that the land shall be holden free from incumbrances ; and lastly (5), for further assurance (*b*).

Whether the covenants for seisin and for right to convey were separate covenants or only one was doubted. “ But the better opinion appears to be that they constitute two several and independent covenants, for although if the vendor be seised in fee he has power to convey, yet the converse of this proposition does not hold, for a person may have power to convey though not seised in fee ” (*c*). Thus, where a person conveyed under a power, the covenant was that the grantor had good right to convey, and the covenant for seisin was omitted.

Seisin and right to convey separate covenants.

It became usual in modern conveyances to omit the covenant for seisin, and now the covenants implied under the Conveyancing and Law of Property Act, 1881 (*d*), s. 7, in a conveyance for valuable consideration other than a mortgage, when a person is expressed to convey as beneficial owner, are for—(1) right to convey ; (2) quiet enjoyment ; (3) freedom from incumbrance ; and (4) further assurance. “ These are not four separate and distinct covenants, but part of one entire covenant beginning with and controlled throughout by the words, ‘ that notwithstanding anything by the person who so conveys, or anyone through whom he derives title otherwise than by purchase for value. ’ These words render a vendor’s covenant a qualified covenant, and not an absolute warranty of title, as is the covenant of a mortgagor who conveys as beneficial owner. . . . The statute has in this respect followed the well-known practice of conveyancers, as may be seen from *Browning v. Wright* (*e*), *Church v. Brown* (*f*), and

Covenant for seisin now omitted.

44 & 45 Vict. c. 41, s. 7.

Covenants implied in a conveyance.

(*b*) Sug. V. & P. 599.

(*c*) Cru. Dig. vol. 4, p. 377 (6th ed.).

(*d*) 44 & 45 Vict. c. 41.

(*e*) 2 Bos. & P. 13.

(*f*) 15 Ves. 258, 263.

the ordinary forms of conveyances. But although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions covenanted against are reducible to four heads, viz. :—(i) The acts and omissions of the vendor himself; (ii) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (iii) the acts and omissions of persons claiming through him; (iv) the acts and omissions of persons claiming in trust for him" (g).

Validity of
lease.

In a conveyance of leasehold property for valuable consideration other than a mortgage a further covenant for the validity of the lease is implied where the person is expressed to convey as beneficial owner (h).

A lease was made to L. for eleven years, if the lessor should so long live, and L. assigned the residue of the lease to the plaintiff, without stating that it was determinable on the lessor's death, and L. covenanted that, notwithstanding any act, deed, matter or thing whatsoever by him at any time theretofore made, done, committed or knowingly occasioned, suffered or omitted to the contrary, the said lease was a good, valid and effectual lease, and that the same and the term of eleven years therein expressed were respectively in full effect, and in no wise forfeited, surrendered, assigned, determined or otherwise become void or voidable, or prejudicially affected in any manner howsoever than effluxion of time. The lessor died before the assignment, and the reversioner re-entered. It was held that L.'s covenants only extended to the acts of himself and those claiming under him, and that the determination of the term by the death of the lessor was not a breach of the covenants (i).

A covenant, in an assignment of a lease for three lives, that "the lease was a good, valid and subsisting lease for

(g) *David v. Sabin*, (1893) 1 Ch. A. 523, p. 531, per Lindley, L. J.

(h) 44 & 45 Vict. c. 41, s. 7 (B).

(i) *Stannard v. Forbes*, 6 A. & E. 572.

the lives of A., B. and C., and the survivors or survivor of them," was held not to be broken, although one of the *cestui que vie* was dead at the date of the assignment (*k*).

In mortgages, the same covenants as in conveyances are implied by a person who conveys and is expressed to convey as beneficial owner, except that the covenant for quiet enjoyment does not become operative until default has been made, and the covenant is an absolute warranty of title, instead of being restricted to those from whom the covenantor derives title otherwise than by purchase for value (*l*).

If such a covenant is introduced in a bill of sale, it will be a variation from the scheduled form, rendering the bill of sale invalid (*m*).

In a mortgage of leaseholds, a covenant for the validity of the lease and for due performance of the lessee's covenants is implied (*n*).

In settlements, a covenant for further assurance is implied by a person who is expressed to convey "as settlor" (*o*), and in accordance with the ordinary practice, and the rule of the Court that trustees covenant against their own acts only (*p*), in any conveyance where a person is expressed to convey as trustee or mortgagee, or as personal representative, of a deceased person, or as committee of a lunatic, so found by inquisition or under an order of the Court, a covenant (deemed to extend to such person's acts only) is implied against incumbrances (*q*).

The section also contains provisions as to covenants implied where one person conveys by the direction of another, the person who gives the direction being deemed to convey as beneficial owner (*r*).

(*k*) *Coates v. Collins*, L. R. 7 Q. B. 144.

(*l*) 44 & 45 Vict. c. 41, s. 7 (C).

(*m*) *Ex. p. Stanford*, 17 Q. B. Div. 259.

(*n*) 44 & 45 Vict. c. 41, s. 7 (D).

(*o*) 44 & 45 Vict. c. 41, s. 7 (E).

(*p*) *Onslow v. Londesborough*,

10 Hare 67, p. 74; cf. *White v. Foljambe*, 11 Ves. 345.

(*q*) S. 7 (F).

(*r*) S. 7 (2).

Mortgages.

Settlements.

Trustee, &c.

Conveyance
by direction
of another.

Where a wife and husband both convey "as beneficial owner," the wife is deemed to convey by the direction of her husband, and, in addition to the covenant implied on the part of the wife, there is also implied a covenant by the husband as the person giving the direction, and also a covenant by the husband in the same terms as that implied on the part of the wife (*s*).

No covenant implied if words of section not used.

No covenant will be implied if the person conveying is not expressed to convey "as beneficial owner," &c. (*t*).

A "conveyance" in this section includes a deed conferring the right of admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance other than a deed conferring the right to admittance to copyhold or customary land (*u*).

The benefit of the implied covenants is annexed and incident to and goes with the estate or interest of the implied covenantee, and is capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (*x*).

The covenants may be varied or extended by deed (*y*). A proviso limiting the liability of a tenant for life on the covenant implied by his conveying as beneficial owner is usually inserted.

Lunatic.

In *Re Fox* (*z*), the Court was asked to sanction a covenant by the committee of the lunatic for debts, not of the lunatic but of another person. The Court did not intend to go the length of deciding that the Court had no power of sanctioning any covenant by a committee on behalf of a lunatic.

The Court has jurisdiction under sect. 124 of the Lunacy Act, 1890, to authorize a committee who is selling the

(*s*) S. 7 (3).

(*t*) S. 7 (4).

(*u*) S. 7 (5).

(*x*) S. 7 (6).

(*y*) S. 7 (7).

(*z*) 33 Ch. Div. 37.

lunatic's property under an order, not only to convey, but on his behalf to enter into the ordinary covenants for title (a).

The benefit of covenants for title runs with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the lands purchased by him. Benefit runs with the land.

In *Middlemore v. Goodale* (b), the defendant, by indenture, infeoffed J. S. of such lands, and covenanted for himself and his heirs with the feoffee, his heirs, and assigns, to make further assurance on request, which lands J. S. conveyed to the plaintiff, who brings this action because the defendant did not levy the fine upon the plaintiff's request. The defendant pleaded release from the said J. S., with whom the first covenant was made, and it was dated after the commencement of the suit, and therefore the plaintiff demurred, and all the Court agreed that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the statute, shall have the benefit thereof. Secondly, they held that, although the breach was in the time of the assignee, yet, if the release had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action, wherein the assignee is interested. Whereupon rule was given that judgment should be entered for the plaintiff, unless cause was shown to the contrary by such a day.

But it appearing that the conveyance was made to the plaintiff and Frances, his wife, and to the heirs of the plaintiff, and he brings this action sole without naming

(a) *Re Ray*, (1896) 1 Ch. A. 468.

(b) *Cro. Car.* 503.

his wife who is yet alive, and who ought to have joined in the action, judgment was given for the defendant (c).

Covenant lies by the devisee of lands in fee upon a covenant made by the defendant to the testator to whom the defendant conveyed the lands in fee, that the defendant was lawfully seised and had good right to convey. "The covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties* as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime; but, according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate" (d).

In *Noke v. Auder* (e), King made a lease for years to A., the defendant, who by deed granted it to Abel, and covenanted with him that he and his assignees should peaceably enjoy it without interruption. Abel grants it to J. S., who grants the term to the plaintiff, who, being ousted by a stranger, brings this action. It was alleged, in arrest of judgment, that this action lay not for the second assignee, unless he could show them the deed of the first covenant, and of the assignment and of every mesne assignment, for without deed none can be assignee to take advantage of any covenant. But Popham held that he shall have advantage without the deed of assignment, for there is a difference where a covenant is annexed to a thing which of its nature cannot pass at the first without deed, and where not. The case was adjourned, and on its being

(c) Cro. Car. 505.

(d) *Kingdon v. Nottle*, 4 M. & S.

53, p. 57, per Ellenborough, C. J.

(e) Cro. Eliz. 373.

moved again (*f*), all the justices agreed that the assignee shall have an action of covenant without showing any deed of assignment, for it is a covenant that runs with the estate.

The assignee of an assignee of a lessee for a term of years may maintain an action upon a covenant for quiet enjoyment entered into by the lessee with the first assignee and his assigns upon the assignment of the term to him (*g*).

In *David v. Sabin* (*h*), certain lands were leased by Sabin to Baylis in 1885 for a term of ninety-nine years. Baylis then granted sub-leases by way of mortgage, and in 1887 surrendered the lease to Sabin for valuable consideration without mentioning the mortgages. In 1887 Sabin sold part of the land to Baylis under his powers as tenant for life under the Settled Land Acts, and was expressed to convey as beneficial owner. Baylis conveyed this land to Bryant, who mortgaged to the plaintiff. It having been held that the mortgagees of Baylis by sub-demise had priority over the plaintiff, he sued Sabin on the covenants implied under the Conveyancing and Law of Property Act, s. 7. It was held that although Sabin would have had an answer to an action by Baylis, he was liable to the plaintiff, for he had professed to convey more than he had a right to convey—viz., an estate free from incumbrances created by himself or any person claiming under him. The mortgage by Baylis by sub-demise was an act by a person rightfully claiming under Sabin within the meaning of the covenant.

Estates were devised to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an Act of Parliament vesting the estates in trustees in trust

Tenant for life must covenant for title if he directs sale.

(*f*) Cro. Eliz. 436.

(*g*) *Lewis v. Campbell*, 8 Taunt. 715.

(*h*) (1893) 1 Ch. A. 523.

to sell. It was held that when settled estates are sold under a power to sell with the consent of the tenant for life, he must covenant for title, and that A. and B. must covenant with the purchaser for title (*i*).

Where trustees of a settlement of real estate were empowered to sell by the direction of the tenant for life, it was held that, upon a sale in pursuance of the power, the tenant for life was bound to enter into the ordinary covenants for title (*k*).

Where real estate vested in trustees, whose receipt was declared to be a good discharge, was sold by the Court in order to divide the proceeds among the beneficiaries, it was held that the beneficiaries were not bound to covenant for title (*l*).

Damages
include value
of houses
erected.

Where A. sold some building land to B., and covenanted for title, and after building some houses the purchaser was evicted, he was held entitled to recover upon the covenants not only the value of the land, but also that of the houses subsequently built thereon, the land having been sold as building land (*m*).

Copyhold
instead of
freehold.

In *Gray v. Briscoe* (*n*), B. covenanted that he was seised of Blackacre in fee simple, when in truth it was copyhold in fee according to the custom. By the Court: "The covenant was broken, and the jury shall give damages in their conscience according to that rate that the country values fee simple land more than copyhold lands."

Covenants for title extend to defects which are known to the covenantee at the time the covenants are entered into.

In *Page v. Midland Railway Company* (*o*), Amy Page agreed with a railway company for the sale to them in fee of land to which she derived title under the will of Ann

(*i*) *Re London Bridge Acts*, 13 Eq. 230.
Sim. 176.

(*m*) *Bunny v. Hopkinson*, 27 Beav. 565.

(*k*) *Earl Poulett v. Hood*, L. R. 5 Eq. 115.

(*n*) *Noy*, 142.

(*l*) *Cottrell v. Cottrell*, L. R. 2 (*o*) (1894) 1 Ch. A. 11.

Palmer, and whether she could make a good title depended on the construction of that will. The sale was completed by a conveyance dated the 26th June, 1879, which fully recited the will of Ann Palmer; and Amy Page for herself, her heirs, executors, and administrators covenanted with the company that "notwithstanding any act or thing by the said Amy Page, or the said Ann Palmer deceased, or any of her ancestors, made, done or executed, or knowingly suffered the said (mortgagees of Amy Page), or some or one of them, now have or hath good right and full power to grant and release, and the said Amy Page now hath good power to grant and confirm the said hereditaments." The purchase-money was paid to Amy Page. After her death her children, claiming under the will of Ann Palmer, obtained judgment against the railway company for payment of the purchase-money. The company were held entitled to sue Amy Page's representatives under her covenant for title, and *Hunt v. White* (p) was overruled.

In *Jenkins v. Jones* (q), Jenkins sought to recover certain lands by ejectment from B., who alleged that one-fourth of the lands belonged to Jones, who had never been in possession. Jenkins took from Jones a conveyance of his share for the sum of £10, containing the following covenant:—"And the said Jones doth hereby for himself, his heirs, executors and administrators, covenant with the said Jenkins, his heirs and assigns, that notwithstanding anything by him the said Jones done or knowingly suffered, the said Jones now hath power to grant the said premises, and that all the said premises may be quietly entered into, held and enjoyed by the said Jenkins, his heirs and assigns, without any interruption by the said Jones or any person claiming through or in trust for him." The actual value of Jones' share was £500. Jenkins took possession

(p) 37 L. J. Ch. 326; 16 W. R. 478.

(q) 9 Q. B. Div. 128.

of the lands, but Jones had previously been bankrupt, and after Jenkins took possession, Jones' trustee in bankruptcy recovered possession of his one-fourth share. Jenkins brought an action for damages for breach of the covenants for title and quiet enjoyment, and was held entitled to recover £500 damages from Jones.

By an indenture of conveyance in 1898, the defendant as beneficial owner granted to the plaintiff certain land, subject to certain specified rights of way. The land was sold for building purposes, and the plaintiff, after building a house thereon, discovered that a further right of way over his land had been granted by the defendant in 1891. In an action for damages for breach of the covenant for title implied under sect. 7 of the Conveyancing Act, 1881, it was held that the breach was complete on the execution of the conveyance, and that the proper measure of damages was the difference between the value of the property as it purported to be conveyed and its value as the defendant had power to convey it (*r*).

No title to
part.

By a conveyance (supplemental to a "principal agreement" under which the vendor was entitled to a lease of certain land coloured red on the plan annexed to the agreement), the vendor, as beneficial owner, conveyed "all his estate, term, and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement." It appeared that the vendor had given up his interest in a small portion of the land coloured red for readjustment of boundaries. The purchaser sued on the covenant, and obtained a declaration that the vendor was liable to make good the damage and an inquiry as to the amount (*s*).

Where a lease was granted by deed in terms from which the law implies a covenant for title, and the lessor proved to have no title to part of the demised premises, it was

(*r*) *Turner v. Moon*, (1901) 2 Ch.
825.

(*s*) *May v. Platt*, (1900) 1 Ch.
616.

held that the lessee might refuse to take possession of such part of the demised premises, and elect to keep the remainder, and in an action for rent due under the lease, claim damages for breach of the implied covenant by way of counterclaim (*t*).

By an agreement not under seal, operating as an immediate demise, the defendant agreed to "let" to the plaintiff certain premises for the term of three years. The defendant was himself a lessee of the premises, which by the terms of the lease were subject to a restrictive covenant, of which the plaintiff had no notice, as to carrying on any business thereon. The plaintiff entered into possession, and carried on his business on the premises until restrained by injunction obtained by the superior landlord. In an action for quiet enjoyment, it was held that, whether or not any contract for quiet enjoyment could be implied from the use of the word "let," the use of that word did not create an unrestricted contract for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount (*u*).

A covenant that a lessee "peaceably and quietly should have and enjoy, &c. during the term, without eviction and interruption of any person," was held in 15 & 16 Eliz. to be broken by the tortious entry of a stranger (*x*); but this case has been overruled, for "the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose; for the law itself does defend every man against wrong, and though one warrants land to another expressly, yet he does not defend against tortious entries" (*y*).

Quiet enjoyment not extended to tortious entry.

A covenant that a purchaser should enjoy certain lands in New York without the let, hindrance, &c. of the vendor

(*t*) *Mostyn v. West Mostyn Coal and Iron Company*, 1 C. P. D. 145.

(*u*) *Jones v. Lavington*, (1903) 1 K. B. A. 253.

(*x*) *Mountford v. Catesby*, 3 Dyer, 328a.

(*y*) 2 Wms. Saund. 178 n. (8).

or his heirs, and of every other person or persons whomsoever, was held not broken by the States of America seizing the lands for an act done previous to the conveyance (z).

In an action against executors in their own right on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment of a lease of the testator by way of mortgage, the declaration must show a breach by some act of the covenantors, or that the evictor's title commenced before the assignment made by them (a).

In *Nash v. Palmer* (b), Lord Ellenborough says: "The rule has been correctly stated, that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title, and the reason is because, as regards such acts as may arise from rightful claims, a man may well be supposed to covenant against all the world, but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest, and therefore the law has properly restrained it within its reasonable import, that is, to lawful title."

Unless an individual is named.

But where an individual is named, the covenantor is presumed to know the person against whose acts he covenants, and may reasonably be expected to stipulate against any disturbance by him, whether lawful or unlawful (c). Thus, where a lessor covenanted to save harmless the lessee concerning the premises and the profit thereof to be received against J. D., parson of S., and afterwards the lessee was ejected by J. D. without title, the covenant was held to be broken (d).

(z) *Dudley v. Ffolliot*, 3 T. R. 584.

(a) *Noble v. King*, 1 H. Bl. 35; cf. *Nind v. Marshall*, 1 Brod. & B. 319.

(b) 5 M. & S. 374, p. 379.

(c) *Nash v. Palmer*, 5 M. & S. 374; *Fowle v. Welsh*, 1 B. & C. 29; 2 D. & R. 33; 2 Wms. Saund. 178a, n. (a).

(d) *Foster v. Mapes*, Cro. Eliz. 212.

A covenant for quiet enjoyment is broken by an entry of the covenantor himself, even though such entry be tortious, and might be the subject of an action for trespass (e). Breaches of covenant for quiet enjoyment.

And if the covenant extends to heirs or executors, the rule equally applies to them (f). But there must be an assertion of right and title in the covenantor, and not a mere wrongful act, such as going to sport on the land (g), or entering for the purpose of an assault (h).

A covenant by a lessor that his lessee should quietly enjoy the demised premises against all claiming or pretending to claim any right in them was held broken by a tortious eviction (i).

A suit in equity by which a purchaser is disturbed is within a covenant for quiet enjoyment against disturbances generally (k).

A lessor who covenanted for quiet enjoyment at the time of the lease was the owner of the equity of redemption. Notice to pay the rent to the mortgagee was given, and this was held to be eviction or molestation by a person claiming under the lessor (l).

But now, under the Conveyancing and Law of Property Act, 1881 (m), a mortgagor in possession has power to grant leases.

In *Young v. Raincock* (n), a vendor covenanted that, notwithstanding any act, matter, or thing by the vendor or his wife, or A. H., done, &c., the vendor and his wife, or

(e) *Crosse v. Young*, 2 Show. 421.

425; *Lloyd v. Tomkies*, 1 T. R. 671; *Tisdale v. Essex*, Cro. Jac. 425; *Moore*, 861; *Core's Case*, Cro. Eliz. 544; 1 Rolle's Abridgment, tit. Condition, 430.

(f) *Forte v. Vine*, 2 Rolle's Rep. 21; *Sug. V. & P.* 600.

(g) *Seddon v. Senate*, 13 East, 72.

(h) *Penn v. Glover*, Cro. Eliz.

421.

(i) *Chaplain v. Southgate*, 10 Mod. 384; *Perry v. Edwards*, 1 Stra. 400.

(k) *Sug. V. & P.* 600 (14th ed.); *Calthorp v. Hayten*, 2 Mod. 54; *Hunt v. Danvers*, T. Ray, 370.

(l) *Carpenter v. Parker*, 27 L. J. C. P. 78.

(m) 44 & 45 Vict. c. 41, s. 18.

(n) 7 C. B. 310.

one of them, was seised, and had lawful authority to appoint, &c., and that it should be lawful for the purchaser, his heirs, &c., peaceably and quietly to hold the messuage without any lawful let, suit, &c., by them, the vendor and his wife, or either of them, their, or either of their heirs, &c., or from or by any other person or persons whomsoever lawfully or equitably claiming, or to claim by, from, or under, or in trust for him, them, or either of them. One, P. H., claimed to be heir at law of A. H., and evicted the purchaser, whose executors sued for breach of the covenant for quiet enjoyment, and it was held that the generality of the covenant for quiet enjoyment was not restricted by the introductory words of the covenant for title.

Premises let
for purposes
subsequently
made illegal.

In *Newby v. Sharpe* (o), the defendant let the basement of a store to the plaintiff, "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to other persons for storing gunpowder. Shortly after, the Explosives Act, 1875, was passed, making it illegal to store cartridges and gunpowder in one building. When the Act came into operation the defendant removed the plaintiff's cartridges from the building. It was held that the removal of the cartridges was a trespass, and not an eviction, and that there had been no breach of covenant by the defendant, as the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition.

Interference
with enjoy-
ment.

In *Spoor v. Green* (p), the question was whether the defendant was liable to the plaintiff, upon a covenant given by the defendant to the plaintiff's vendor and his appointee, for title, quiet enjoyment, and indemnity. The breach of covenant assigned was that certain persons, lawfully entitled under a lease from the defendant, entered

upon mines and worked them, and took the plaintiff's coal, and in consequence the land subsided, and a house built thereon was greatly damaged. A good cause of action had been shown, but the facts of the case were held not to support the declaration.

By a general system of drainage, made by the defendants in a particular district, various farms were drained by several underground drains passing through such farms. The defendants let one of these farms to the plaintiff with a covenant for quiet enjoyment against the acts of the lessors, or any persons lawfully claiming through or under them. The defendants had previously let a farm adjoining to C., with a right to use the drains through the plaintiff's land. C., by an excessive user of the drainage system, caused the water passing down the drains to overflow into the plaintiff's land and damage the plaintiff's crops. Damage was also done to a field on the plaintiff's land by an escape of water arising from imperfectly constructed drains properly used by C. It was held that the defendants were not liable for the excessive user by C. of the drainage system, but that they were liable for a breach of the covenant for quiet enjoyment in respect of the damage caused by the improper construction of the drains (q).

"The case of *Sanderson v. Mayor of Berwick-on-Tweed* (q) is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment" (r).

Where a lessee of two rooms in a block of buildings, which he used as offices, brought an action against his lessors and a tenant under them of other part of the buildings to restrain the use of the upper part of the building for dancing and musical entertainments, so as

(q) *Sanderson v. Mayor of Berwick-upon-Tweed*, 15 Q. B. Div. 547.

(r) *Harrison Ainslie and Company v. Muncaster*, (1891) 2 Q. B. A. 680, p. 684, per Esher, M. R.

to occasion a nuisance to the plaintiff, it was held that there was no breach of the covenant for quiet enjoyment, but that the plaintiff was entitled to damages for the nuisance (s).

Shaw v. Stenton (t) "was a case in which the lessor, having mines above the seams of coal which he demised, . . . so worked those mines as to damage the coal below." The case is an authority that a covenant for quiet enjoyment goes beyond rightful acts, that is to say, the rightful acts of a person who comes by virtue of his title.

The case of *Sanderson v. Mayor of Berwick-on-Tweed* (u) may be referred to as indicating what was the doctrine of *Shaw v. Stenton* (t). There the judgment was given by Fry, L. J., who says: "The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendant, of the plaintiff's enjoyment of the land." In that case there was water and drainage actually coming into the field and making it uninhabitable, that is to say, interrupting the actual physical enjoyment. That seems to be the meaning of the passage in which the Lord Justice laid down this:—"It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to be broken, although neither the title to the land nor the possession of the land may be otherwise affected" (v).

In *Harrison Ainslie & Co. v. Lord Muncaster* (x), a lessor

(s) *Jenkins v. Jackson*, 40 Ch. D.

(u) 13 Q. B. Div. 547, 551.

71.

(v) 40 Ch. D. p. 74, per Kekewich, J.

(t) 2 H. & N. 858.

(x) (1891) 2 Q. B. A. 680.

leased a mine to the Parkside Mining Company, and subsequently leased an adjoining mine to the plaintiffs. The lease to the plaintiffs contained a covenant for quiet enjoyment of the mine "without any interruption or eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The Parkside Company, while properly working their mine, released a large body of underground water, which flooded them out, and penetrated into the plaintiffs' mine, doing considerable damage. It was held that the plaintiffs could not recover damages for breach of the lessor's covenant for quiet enjoyment. "It was the flow of water into the mine which alone constituted the interruption, and unless that flow of water can be made out to be an interruption by the defendant, or by persons claiming under him, the defendant must succeed. Was, then, the flow of water which is an interruption of the enjoyment of the plaintiffs' mine caused by the Parkside mine within the meaning of the covenant? In one sense I quite agree that it is caused by the Parkside mine, because it is caused by the act which the Parkside mine did. But is it caused by it in the sense that that covenant intends to be affixed to the term? . . . It seems to me that we must confine this covenant within reasonable limits. I think that an interruption under such a covenant is not caused by the lessor, or those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it was foreseen, or ought by reasonable care to have been foreseen, that the consequence in the particular case would be an interruption" (y).

In *Manchester, Sheffield and Lincolnshire Railway Company v. Anderson* (z), an Act was passed in 1893 enabling the railway company to take certain property, and on 7th April, 1894, a lease for twenty-one years was granted to the defendant of a house on that property, containing a covenant for quiet enjoyment in the ordinary form.

(y) (1891) 2 Q. B. A. 688, 689, per Bowen, L. J.

(z) (1898) 2 Ch. A. 394.

In October, 1895, the railway company bought up the reversion subject to the lease, and shortly afterwards commenced the construction of the railway. In so doing the defendant's house was structurally damaged, and the access to his premises was made less convenient by the erection of hoardings and taking a great number of carts along the street. A passage along which the defendant had a right of way was incumbered by bricks and rubbish so that it could not be used for two or three days. The railway company sued for rent, and the defendant counterclaimed for damages for breach of the covenant for quiet enjoyment. It was held that none of these things, except the structural damage to the house, were breaches of the covenant; but even if they were, the acts done by the railway company were done under its statutory powers, and the defendant's remedy was compensation under the Railways Clauses Act, 1845, and the Lands Clauses Act, 1845. The counterclaim was accordingly dismissed.

Causing
chimneys
to smoke.

In *Tebb v. Cave* (a), the owner of two adjoining pieces of land erected a house on one of them, which he demised to the plaintiff, with whom he covenanted for quiet enjoyment "without any interruption or disturbance whatsoever from or by the said lessor, or any person or persons lawfully or equitably claiming through, under or in trust for him." Soon after the lease had been executed, and after the plaintiff had been let into possession, the defendant erected on his adjoining land a block of flats about 20 feet higher than the plaintiff's house, with the result that a number of the plaintiff's chimneys smoked, and certain rooms were uninhabitable when the wind was in the north-east or south-west. It was held that there was a breach of the covenant for quiet enjoyment, and that the plaintiff was entitled to an inquiry as to damages and the costs of the action.

In *Davis v. Town Properties Investment Corporation, Ltd.* (b), a lease of offices was granted to the plaintiff in 1897 by the

(a) (1900) 1 Ch. 642.

(b) (1903) 1 Ch. A. 797.

then owner of the freehold, and contained the usual covenant for quiet enjoyment. In 1898 the lessor conveyed the reversion subject to the lease to the defendant. In 1900 the defendants purchased a house adjoining the demised premises, pulled it down, and erected new buildings of such a height that it caused one of the plaintiff's chimneys to smoke. It was held that there had been no breach of the covenant for quiet enjoyment, and some doubt was expressed whether *Tebb v. Cave* (c) was rightly decided on the ground of breach of covenant, seeing that in that case the defendant was not directly interfering with the plaintiff's house. "The plaintiff in that case had no right to any easement in respect of the current of air coming over the defendant's land, and the plaintiff's chimneys smoked simply because the current of air was interfered with, and not otherwise by any act of the defendant" (d).

The owner of a house let out in floors to separate tenants let the plaintiff the ground floor and basement, and covenanted that the plaintiff might peaceably hold and enjoy the demised premises during the term without any interruption by him. The different floors were supplied with water by a cistern at the top of the house, and the water was distributed by a main pipe connected with the cistern, each floor having a separate branch inserted in the main pipe. The branch service pipe supplying the first floor burst, and a quantity of water flowed into the basement and injured the plaintiff's goods. The owner paid the water rate, receiving from the plaintiff half the amount paid, and had not demised the cistern. There had been no negligence in keeping and maintaining the cistern and pipes. The plaintiff sued the owner for breach of the covenant for quiet enjoyment, but was not successful (e).

Injury from
bursting of
water pipe.

A covenant by the lessor that the lessee should hold the premises "without any lawful let, suit, interruption, or

Eviction by
superior
landlord.

(c) (1900) 1 Ch. 642.

(d) (1903) 1 Ch. A. 805, per Cozens-Hardy, L. J.

(e) *Anderson v. Oppenheimer*, 5 Q. B. Div. 602.

eviction by the lessor, or by or through the lessor's acts," &c., was not broken by the eviction of the lessee by the superior landlord for breach of a covenant not to use the premises as a shop, contained in a lease under which the lessor held the premises, but of which the lessee was ignorant (*f*).

In *Dennett v. Atherton* (*g*), the defendant, on a conveyance to him of certain land in fee, covenanted with the vendor that he and his assigns would not permit to be carried on in any building built on any part of the land the trade of a seller of beer. The defendant afterwards demised a building then used as a grocer's shop, and the lessee covenanted that he and his assigns would not therein carry on certain trades (that of a seller of beer not being one). The defendant covenanted that the lessee and his assigns should peaceably enjoy the demised premises without any lawful let, suit, or interruption by or from the defendant, or any person lawfully claiming by or under him. This lease was assigned to the plaintiff, who, without notice of the defendant's covenant with the vendor, fitted up the premises as a beer-shop. The vendor obtained an injunction restraining the plaintiff from carrying on the trade of a beer-house on the premises, and the plaintiff sued the defendant for breach of the express or implied covenant for quiet enjoyment. It was held that the express covenant for quiet enjoyment excluded any implied covenant, and that the covenant did not amount to a warranty that the lessee might use the premises for any purposes not mentioned in the restrictive covenant on his part, and that the plaintiff could not recover.

"In *Dennett v. Atherton* (*g*), the purpose for which the land was used was not a purpose which was actually contemplated by the parties at the time the demise was made, or was in their necessary contemplation at that time" (*h*).

(*f*) *Spencer v. Marriott*, 1 B. & C. 457; 2 D. & R. 665.
(*g*) L. R. 7 Q. B. 316.

(*h*) *Harrison Ainslie & Co. v. Lord Muncaster*, (1891) 2 Q. B. A. 680, p. 690, per Bowen, L. J.

In *Kelly v. Rogers* (i), an underlease contained a covenant by the lessor for quiet enjoyment of the demised premises by the lessee, "without any interruption from or by him the said lessor, his executors, administrators or assigns, or any person or persons whomsoever lawfully claiming by, through, or under him." The owners of the reversion upon the original lease recovered possession of the premises under a condition of re-entry contained therein for non-payment of rent and breach of covenant. It was held that there was no breach of the covenant for quiet enjoyment, the interruption being the act of the superior landlord, not that of the sub-lessor, or any person claiming by, through, or under him.

In *Cohen v. Tannar* (j), a shop was let to the defendant for the term of three years, and the defendant covenanted not to assign without licence. The defendant assigned the residue of the term to the plaintiff without licence. Subsequently the lessor assigned his reversion to assignees, who brought an action to recover possession against the defendant, who consented to judgment for possession, the result being that the plaintiff was evicted. It was held that, as the defendant had a good defence to the action, the breach of covenant having occurred before the assignment of the reversion, the act of the defendant in consenting to judgment for possession was the cause of the interruption of the plaintiff's enjoyment, and therefore a breach of the covenant for quiet enjoyment.

In *Witchcot v. Nine* (k), an action for debt was brought upon an obligation to perform the covenants contained in an indenture. The covenant was for quiet enjoyment without let, trouble, interruption, &c. The plaintiff assigned his breach that he forbade his tenant to pay his rent; this was held by the Court to be no breach, unless

Notice to
tenant to
pay rent not
breach.

(i) (1892) 1 Q. B. A. 910; cf. *Stanley v. Hayes*, 3 Q. B. 105.

(j) (1900) 2 Q. B. A. 609.

(k) *Brownlow & Goldesborough*, 81.

there was some other act; and the defendant pleaded that, after the time the plaintiff said that he forbade the tenant to pay the rent, the tenant did pay the rent to the plaintiff.

Unless actual payment.

In *Edge v. Boileau* (*l*), a lease contained a covenant for quiet enjoyment, the lessee paying the rent and performing the covenants, &c.; and the lessee covenanted to pay the rent and keep the premises in repair. The rent being in arrear and the premises out of repair, the lessors served notice on sub-lessees to pay rent to them, and not to the lessees, refused to withdraw the notice, and actually received rent from one of the sub-lessees. An action for breach of the covenant for quiet enjoyment was held to be maintainable by the lessee, that covenant, and the covenants by the lessee to pay rent and to repair, being independent covenants.

In *Dawson v. Dyer* (*m*), premises were demised for a term at a certain rent, with a proviso for re-entry if the rent should be in arrear for twenty-one days. The lessee covenanted to pay the rent, and the landlord covenanted that he, paying the rent at the appointed time, should quietly enjoy, &c. It was held that the lessee, having been disturbed in his possession, might bring covenant against his landlord, though at the time when the cause of action accrued the rent had been in arrear for more than twenty-one days.

Measure of damages.

The rule in *Flureau v. Thornhill* (*n*), that where a contract for the sale of real estate goes off in consequence of a defect in the vendor's title, the purchaser is not entitled to damages for the loss of his bargain, does not apply to the case of a lease granted by one who has no title to grant it. "The rule of the common law is that where a person sustains a loss by reason of a breach of contract, he is, as far as money can do it, to be placed in the same situation with

(*l*) 16 Q. B. D. 117.

(*m*) 5 B. & Ad. 584.

(*n*) 2 W. Bl. 1078; approved in *Bain v. Fothergill*, L. R. 7 H. L. 158.

respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* (o) qualified that rule of the common law" (p).

In *Lock v. Furze* (q), A. was in possession of premises under a lease from B. which would expire on the 4th December, 1864. In February, 1860, in consideration of a premium of £400, A. obtained from B. a further lease of the same premises for twenty-one years and twenty-one days, to commence from the expiration of the former lease. On the death of B. in 1863, it was found that B. was only tenant for life, with power to grant leases in possession and not in reversion, and the lease being void, A. obtained from the reversioners a lease for seven years at an increased rent. It was held that A. was entitled to recover from B.'s executor, upon the covenant for quiet enjoyment contained in the lease, not only the £400 premium and the cost of preparing the void lease, but also the difference in value between the term professed to be granted by the void lease and that of the seven years' term obtained from the reversioners.

Where there was an agreement to grant the use of an entrance to premises, and the entrance was stopped up by third parties, the person who was to have had the entrance was held entitled to such damages as would amount to the difference between the value of his property without the entrance and its value if the contract had been performed and a good title to the entrance given (r).

Where premises were demised by C. to R. for a term of seventeen years, C. covenanted that R., "paying the rent hereby reserved, and performing the covenants hereinbefore contained, shall and may peaceably and quietly have, enjoy, &c. the premises during the term without any

(o) 2 W. Bl. 1078; approved in *Bain v. Fothergill*, L. R. 7 H. L. 158.

(p) *Robinson v. Harman*, 1 Exch. 850, p. 855, per Parke, B.

(q) L. R. 1 C. P. 441.

(r) *Wall v. City of London Real Property Company*, L. R. 9 Q. B. 249.

interruption whatsoever from and by the said C. or his executors, &c., or any other person or persons lawfully claiming by, from, or under him or them." An action for trespass was brought by a person claiming under C., of which R. gave C. notice, which R. defended without express authority, and was defeated, and had to pay damages and costs. It was held that C. was entitled to recover from R. the costs and damages and expenses incurred by him in defending the action upon R.'s covenant for quiet enjoyment (s).

Free from incumbrances.

Where A. covenanted to indemnify lands settled on B. from certain debts, the interest of which B. was afterwards compelled to pay, B. was held entitled under the covenant to come against the estate of A. for the sum so paid for interest, together with interest thereon (t).

The grantor's covenant for him and his heirs in a marriage settlement that the premises were free from incumbrance shall come in equally with creditors on bond (u).

In a case in Upper Canada (x), the defendant, in a conveyance of land at Cobourg, covenanted with the plaintiff that he had not done any act or thing whereby the said lands were or might be impeached, charged, affected, or incumbered in title, estate, or otherwise. The land was sold for £150. The defendant had previously mortgaged the land (together with other land of ample value to satisfy the security) for £600, of which £450 remained due. The plaintiff, although he had not actually suffered any damage, was held entitled to recover £450 for breach of the covenant.

In *Lethbridge v. Mytton* (y), the defendant, on his marriage, covenanted with the trustees of his settlement to pay off the incumbrances, amounting to £19,000, upon

(s) *Rolph v. Crouch*, L. R. 3 Exch. 44.

(t) *Fergus v. Gore*, 1 Sch. & Lef. 107.

(u) 2 Eq. Cas. Abr. 460 (9);

Parker v. Harvey, Vin. Abr. Executors, Q. a Ca. 39.

(x) *Connell v. Boulton*, 2 W. C. L. J. N. S. 240.

(y) 2 B. & Ad. 773.

certain estates conveyed by him to them upon certain trusts. Upon his failing to do so, the trustees were held entitled to recover the £19,000, in an action of covenant, though no special damage was laid or proved.

In *Egg v. Blayney* (z), an apportionment was made in January, 1885, of paving expenses, incurred under the Metropolis Management Act, 1862 (a), s. 77, part of which was payable by the defendant in respect of certain property, which he contracted to sell the plaintiff in July, 1885, and conveyed to him in September, the defendant being expressed to convey "as beneficial owner." In June, an order was made for payment of the paving expenses by instalments, and the plaintiff was compelled to pay. He sued the defendant, to recover the amount so paid on the covenant against incumbrances implied under the Conveyancing and Law of Property Act, 1881 (b). It was held, however, that the plaintiff was not entitled to recover, as there is nothing in the Metropolis Management Act making these expenses a charge on the land. It was only a claim or demand upon the defendant personally up to the time of the sale, and did not affect the land.

A charge under the Public Health Act, 1875 (c), is a charge on the premises. So where leasehold premises were contracted to be sold, and at the date of the sale works had been done by the local board under sect. 150 on a road abutting on the premises, and the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed, it was held that the expenses became a charge on the premises at the date of completion, and, as between the vendor and purchaser, were payable by the vendor (d).

In *Averall v. Wade* (e), a party seised of several estates, and indebted by judgment, settled one of the estates for

(z) 21 Q. B. D. 107.

(c) 38 & 39 Vict. c. 55, s. 257.

(a) 25 & 26 Vict. c. 102.

(d) *Re Bettesworth & Richer*, 37 Ch. D. 535.

(b) 44 & 45 Vict. c. 41, s. 7 (1) A.

(e) L.L. & G. (*temp. Sugden*), 252

valuable consideration with a covenant against incumbrances, and subsequently acknowledged other judgments. It was held that the prior judgments must be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute.

Further
assurance.

The execution of a disentailing deed will not, it seems, be ordered as specific performance of a covenant for further assurance (*f*). But a contract to execute a disentailing deed may be specifically enforced, and is not precluded by the Fines and Recoveries Act (*g*), s. 47 (*h*).

A covenant to do all lawful and reasonable acts for further assurance includes the levying of a fine, though not named, and the removal of a judgment or other incumbrances (*i*).

A covenant to do all reasonable acts means such acts as the law requires, and an unnecessary act is not reasonable or one which would be required by law (*k*).

A covenant for further assurance contained in a voluntary assignment of annuities, mortgage debts and policies of assurance, of which no notice had been given in the covenantor's lifetime, was enforced in the administration of the covenantor's estate (*l*).

But in *Hervey v. Audland* (*m*), the executors of a person who had entered into a covenant for further assurance in a voluntary settlement, having refused to perform it, the Court, in a suit instituted by a third party for the administration of the covenantor's estate, would not permit the covenantee to prove as a creditor under the decree in the

(*f*) *Davis v. Tollemache*, 2 Jur. N. S. 1181; 28 L. T. Rep. 188.

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) *Bankes v. Small*, 36 Ch. Div. 716.

(*i*) *King v. Jones*, 5 Taunt. 418, p. 427, per Heath, J.

(*k*) *Warn v. Bickford*, 9 Price, 43; Sug. V. & P. 613.

(*l*) *Cox v. Barnard*, 8 Hare, 310.

(*m*) 14 Sim. 531; cf. *Ward v. Audland*, 16 M. & W. 862; *Aulton v. Atkins*, 18 C. B. 249; *Patch v. Shore*, 2 Dr. & Sm. 589.

administration suit, but gave him leave to bring such action as he might be advised.

Where A. assigned an equitable interest in certain copyholds to trustees of his marriage settlement with a covenant of further assurance, and then obtained admittance, sold them, and appropriated the purchase-money to his own use, the trustees were held entitled to prove against his estate for a specialty debt (n).

In *Stock v. Aylward* (o), Lord Chancellor Brady said: "Now, if under a covenant for further assurance, a purchaser may, as a matter of course, require the removal of a judgment or other incumbrance, it would seem to me that, under this covenant, John Michael the elder would be bound to exonerate from his own debt, secured by the judgment of 1802, the estates of those taking in remainder under this settlement."

In *Ker v. Ker* (p), the Irish Court of Appeal was dealing, not with a conveyance for value, but with a voluntary conveyance, and they decided that in such a case the grantee had no right to be relieved from the charge, because the conveyance was voluntary, and not for value.

In *Re Jones, Farrington v. Forrester* (q), the owner of an estate mortgaged it, and afterwards sold an undivided moiety of it. The conveyance to the purchaser did not mention the mortgage, but contained a covenant for further assurance. The two moieties afterwards devolved on different persons, and it was held that, as between the owners of the two moieties, the unsold moiety must pay the mortgage debt, as the covenant for further assurance in a conveyance for value entitled the grantee to call on the grantor to pay off the charge.

A Court of Equity never compelled a purchaser to take without the title deeds, unless he had a covenant for their

Production
of deeds.

(n) *Re Dickson, Blackburn v.* p. 435.

Dickson, L. R. 12 Eq. 154.

(p) *Ir. R.* 4 Eq. 15.

(o) 8 *Ir. Ch. Rep.* 429, at

(q) (1893) 2 *Ch.* 461.

production (*r*), and "he is not bound to rely on an equitable right to compel the production of deeds, but is entitled to the deeds, or a valid covenant for their production" (*s*).

By the Vendor and Purchaser Act, 1874 (*t*), s. 2, sub-s. (3): "The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

"(4.) Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

"(5.) Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents."

"Where deeds relate to two or more portions of an estate, or to an estate which is held by tenants in common, if any one of the interested parties gets possession of the deeds none of the other parties can get them from him, for no one can show a better title to have them than he has. This is shown clearly by *Foster v. Crabb*" (*u*).

Since 1874 a contract for the sale of lands can be enforced in such a case as there is an equitable right to the production of the deeds.

By the Conveyancing and Law of Property Act, 1881 (*v*), s. 9, an acknowledgment in writing of the right of another to production of deeds and delivery of copies is allowed to be given instead of a covenant for production.

"A person retaining documents is now enabled to give (1) an acknowledgment of the right to production, and

(*r*) *Barclay v. Raine*, 1 Sim. & St. 449; *Fain v. Ayres*, 2 Sim. & St. 533.

(*s*) Sug. V. & P. 452; cf. Dart, V. & P. 143 (5th ed.).

(*t*) 37 & 38 Vict. c. 78.

(*u*) 12 C. B. 136; *Wright v. Robotham*, 32 Ch. Div. 106, p. 108, per Cotton, L. J.

(*v*) 44 & 45 Vict. c. 41.

(2) an undertaking for safe custody, together or separately. The first, unlike a covenant to the same effect, may safely be given by a trustee or mortgagee. He can always produce the documents while he has possession of them, and he ceases to be liable after he has parted with them. He should only give the acknowledgment, and not the undertaking. An ordinary vendor will be liable to give both in the absence of special contract" (x).

In *Hornby v. Matcham* (y), the mortgagee with his own hands burnt the deeds when he was not aware what he was about. Measure of damages.

In *Brown v. Sewell* (z), the mortgagee or his agent lost the deeds. In each case the Court refused to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it from the absence of the deeds, but held that the mortgagor was entitled to relief in respect of the additional expense of procuring evidence of his title, and directed a reference to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds.

In *James v. Rumsey* (a), the mortgagor handed the title deeds to the solicitor of the mortgagees. On his coming to redeem, it was found that one of the deeds had been fraudulently deposited by the solicitor, to secure moneys owing by him. The mortgagor was entitled to have liberty to bring an action to recover the deed, and to an indemnity if the deed was lost, and he was entitled to come to the Court to have his title made clear, and to the costs, but not to any further compensation for the loss of the deed.

(x) Wolstenholme, *Conveyancing and Settled Land Acts*, 8th ed. p. 46; *Re Agg-Gardner*, 25 Ch. D. 600, p. 603.

(y) 16 Sim. 327.

(z) 11 Hare, 49.

(a) 11 Ch. D. 398.

CHAPTER V.

COVENANTS IN LEASES (OTHER THAN COVENANT NOT TO ASSIGN).

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Covenant for Payment of Rent.

No implied
covenant
until entry.

ALTHOUGH the *reddendum* of a lease creates an implied covenant for the payment of rent (a), such implied covenant does not arise until entry (b), and it is usual to insert an express covenant in leases for payment of rent; for, though during the occupation the lessor would have other

(a) *Iggulden v. May*, 9 Ves. 330.

(b) 1 Burr. 125.

remedies against a lessee in the absence of such a covenant, the lease might be assigned to a succession of beggars (*c*), but "where a lessee covenants that he, his executors, administrators and assigns will pay the rent and perform the covenants, though he parts with the possession, and though many subsequent assignments have taken place, he remains, in the case of an express covenant, liable during the whole term" (*d*), and he cannot plead an assignment and tender by the assignee to an action on the covenant (*e*).

"An eviction by a landlord of his tenant from a part of the premises creates a suspension of the entire rent during the continuance of the eviction until the tenant re-enters and resumes possession (*f*); but there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants other than the covenant for payment of rent" (*g*).

Suspended by
eviction.

If a lessee is evicted by title paramount, this is a good plea in bar of an action on the covenant for payment of rent (*h*).

A temporary trespass by a landlord, unaccompanied by any intention to put an end to the tenancy, is not an eviction (*i*).

Where a lessee assigned a term, and the assignee surrendered a small portion of the premises, upon which was a scullery, to the lessor, who in consideration thereof paid the assignee £25 and built him a new scullery of equal value upon another part of the premises, and the value of the premises was not lessened, nor were they substantially

(*c*) 1 Burr. 125.

(*d*) *Staines v. Morris*, 1 V. & B. 8, p. ii.

(*e*) *Orgill v. Kemshead*, 4 Taunt. 642.

(*f*) 1 Wms. Saund. 204, n. (2).

(*g*) *Morrison v. Chadwick*, 7 C. B. 266, p. 283, per Coltman, J.

(*h*) *Walker's Case*, 3 Rep. 22b.

(*i*) 1 Wms. Saund. 208, n. (2); *Bullen v. Leake*, 3rd ed. p. 635; cf. *Newby v. Sharpe*, 8 Ch. Div. 39, p. 50, per Thesiger, L. J.

altered by the surrender, it was held that the lessee was still liable upon the covenant to pay rent, at least, for the apportioned rent for the premises not surrendered. It was not decided whether or not he remained liable to the extent of the whole of the rent originally reserved (*j*).

Liability continues though premises destroyed.

Liability under a covenant for payment of rent continues, although the premises are burnt down (*k*) or destroyed by water (*l*). Even where the landlord is bound to rebuild, his neglect to do so is no set-off against the demand for rent, because the damages are uncertain, and must be assessed by a jury.

No relief in equity.

In such a case, at one time, relief would be given in equity. Lord Northington said (*m*): "The justice of the case is so clear that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that . . . I am surprised this should not be considered as much an eviction as an eviction by title. Though this covenant (for quiet enjoyment) does not extend to oblige the defendant to rebuild, yet where an action is brought for rent, after the house is burnt down, there is a good ground of equity for an injunction until the house is rebuilt."

But it has been decided that there is no right to any such relief, even when the landlord has received the insurance money (*n*).

"The plaintiff might have provided in the lease for a suspension of rent in the case of accident by fire, but not having done so, a Court of Equity cannot supply that provision which he has omitted to make for himself, and it must be intended that the purpose of the parties was accord-

(*j*) *Baynton v. Morgan*, 22 Q. B. Div. 74.

(*k*) *Richard le Taverner's Case*, 1 Dyer, 56a; *Monk v. Cooper*, 2 Stra. 763; *Ld. Raym.* 1477; *Bel-four v. Weston*, 1 T. R. 310; 1 Selw. N. P. 404.

(*l*) *Paradine v. Jane*, Ayleyn, 26; *Carter v. Cummins*, 1 Ch. Ca. 84; 3 Burr. 1638.

(*m*) *Brown v. Quilter*, Amb. 620; cf. *Steel v. Wright*, 1 T. R. 708; Amb. 620, n.

(*n*) *Hare v. Groves*, 3 Anst. 687; *Holtzappel v. Baker*, 18 Ves. 115.

ing to the legal effect of this contract. With respect to the equity which the plaintiff alleges to have arisen from the defendant's receipt of the insurance money, there is no satisfactory principle to support it" (o).

Where an agreement is made for a lease to contain the usual covenants, the proviso for re-entry will be limited to the case of non-payment of rent (p).

A covenant for payment of rent is discharged by bankruptcy (q).

On the general principle that if a man is compelled to do what another is legally compellable to do, a previous request and a promise to indemnify are implied, a tenant who has paid a sum for which his landlord was liable under compulsion has a good answer to an avowry for rent (r).

Compulsory
payment on
behalf of
landlord.

A mortgagor let the mortgaged premises subsequently to the mortgage. The mortgagees during the quarter ending at Michaelmas gave notice of the mortgage to the tenant, and required him to pay the rent thereafter to accrue due to them. A judgment creditor obtained the appointment of a receiver, and after the date of this appointment the tenant, being threatened with legal proceedings, paid the rent to the mortgagees. The receiver claimed payment from the tenant, but it was held that his claim could not be maintained (s).

But where a lessee of land assigned part of the land to A. for the residue of the term, and other part to B. for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor, and A. (on the application of the lessor, and under threat of distress, the lessee having become

(o) *Leeds v. Cheetham*, 1 Sim. 146, p. 150.

(p) *Re Anderton and Milnes*, 45 Ch. D. 476.

(q) 46 & 47 Vict. c. 52, s. 55, *post*, p. 148.

(r) *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524; *Johnson v. Jones*, 9 A. & E. 809.

(s) *Underhay v. Reade*, 20 Q. B. Div. 209.

Relief in
equity.

bankrupt) paid the whole rent, it was held that he had no right of contribution as against B., as they were not liable to a common demand (*t*).

“The Court has very long held, in a great variety of classes of cases, that in the instance of a covenant to pay a sum of money the Court so clearly sees, or rather fancies the amount of damage arising from non-payment at the time stipulated, that it takes upon itself to act as if it was certain that giving the money five years afterwards with interest gives a complete compensation.” That doctrine has been recognized without any doubt upon leases with reference to non-payment of rent, and there is also legislative authority for it by the statute (4 Geo. 2, c. 28) (*u*).

In earlier times relief for non-payment of rent was given at any indefinite period afterwards. 4 Geo. 2, c. 28, proceeds on the idea that the Court of Chancery would, in an action of ejectment for non-payment of rent, relieve against the forfeiture, but limited the period of relief to six months (*x*).

This statute has been repealed by the Statute Law Revision Act, 1867 (*y*), but had been previously practically re-enacted by the Common Law Procedure Act, 1852 (*z*), which renders a formal demand of rent unnecessary in all cases between landlord and tenant if half a year's rent is due and there is no sufficient distress upon the premises. In such a case, if the landlord has a power of re-entry for non-payment of rent, and serves a writ of ejectment, he is entitled to recover, and in case the lessee, or his assignee or other person claiming under the lease, suffers judgment and execution without paying the rent, arrears and costs, and without proceeding for relief in equity within six months of such execution, he is barred and foreclosed from

(*t*) *Johnson v. Wild*, 44 Ch. D. 146.

(*u*) *Hill v. Barolay*, 18 Ves. 56, p. 59, per Lord Eldon.

(*x*) *Wadman v. Calcraft*, 10 Ves. 67; cf. *Doe d. Hitchins v. Lewis*, 1 Burr. 614, p. 619.

(*y*) 30 & 31 Vict. c. 59.

(*z*) 15 & 16 Vict. c. 76, s. 210.

all remedy. But a mortgagee who has not been in possession may pay all rent in arrear, costs and damages within six months.

No relief was given where there were breaches of other covenants besides that for payment of rent (*a*).

Relief can be obtained even where a lease provides that, in case of breach of covenant, it shall be lawful for the lessor to re-enter and expel the lessee, and the lease shall in that case be forfeited and be utterly null and void (*b*).

Formerly a new lease was necessary where forfeiture had taken place (*c*), but the jurisdiction of the Courts of Common Law and Equity in this respect was assimilated by the Common Law Procedure Acts, 1852 (*d*) and 1860 (*e*).

Where, in an action of ejectment upon a forfeiture by non-payment of rent, the plaintiff obtains judgment, but without costs, the defendant may obtain relief from the forfeiture under the Common Law Procedure Act, 1860 (*e*), s. 1, without being required to pay the plaintiff any costs other than those of the summons for relief (*f*).

The Conveyancing and Law of Property Act, 1881 (*g*), does not affect the law relating to re-entry or forfeiture or relief in the case of non-payment of rent.

Covenant to Repair.

A lessee is not liable under a covenant to repair for acts done before the execution of the lease, although the habendum states the premises to be held from a day prior to its

Covenant to repair.

(*a*) *Bowser v. Colby*, 1 Hare, 109; *Herne v. Thompson*, San. & Sc. 615; cf. *Swanton v. Biggs*, 1 Ben. 170.

(*b*) *Bowser v. Colby*, 1 Hare, 109.

(*c*) *Taylor v. Knight*, 4 Vin. Ab.

Ch. 7, pl. 31, p. 406; *Hart v. Leonard*, 9 Mod. 90.

(*d*) 15 & 16 Vict. c. 76.

(*e*) 23 & 24 Vict. c. 126.

(*f*) *Croft v. London and County Banking Company*, 14 Q. B. Div. 347.

(*g*) 44 & 45 Vict. c. 41, s. 14 (8).

execution (*h*), for the operation of the habendum in a lease as a grant is merely prospective (*i*).

General
covenant.

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair (*k*), and extends to buildings erected by the lessee during the term (*l*), but a covenant by the lessor to rebuild does not extend to the lessee's additions (*m*).

In *Bullock v. Dommitt* (*n*), it was held that a lessee of a house who covenanted generally to repair was bound to rebuild if it was burned down by an accidental fire.

Condition of
premises
regarded.

"A general covenant to repair must be construed to have reference to the condition of the premises at the time the covenant began to operate" (*o*).

"Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute no loss which, so far as it results from time and nature, falls upon the landlord" (*p*).

Regard must be had to the character of the house to which the covenant is to apply, even when the covenant is expressed in the largest terms (*q*).

In *Lister v. Lane* (*r*), a house at least 100 years old was

(*h*) *Shaw v. Kay*, 1 Exch. 412.

(*i*) *Wyburd v. Tuck*, 1 B. & P. 464.

(*k*) *Harris v. Jones*, 1 M. & R. 173.

(*l*) *Dowse v. Cole*, 2 Vent. 126; 3 Lev. 264; *Brown v. Blundell*, Skin. 121.

(*m*) *Loader v. Kemp*, 2 Car. & P. 375.

(*n*) 6 T. R. 650; cf. *Walton v. Waterhouse*, 2 Wms. Saund. 420.

(*o*) *Walker v. Hatton*, 10 M. & W. 269.

(*p*) *Gutteridge v. Munyard*, 1 M. & R. 334, p. 336; 7 C. & P. 129.

(*q*) *Payne v. Haine*, 16 M. & W. 541; cf. *Stanley v. Towgood*, 3 Bing. N. C. 4; *Burdett v. Withers*, 7 A. & E. 136.

(*r*) (1893) 2 Q. B. A. 212; cf. *Wright v. Lawson*, W. N. (1903) 108.

demised to lessees who covenanted "when and where, and as often as occasion shall require, well, sufficiently and substantially repair, uphold, sustain, maintain, amend, and keep" the demised premises, and "so well and substantially repaired, upheld, sustained, maintained, amended, and kept," at the end of the term yield up to the lessors. Before the time expired one of the walls was bulging out, and at the expiration of the lease the house was condemned by the district surveyor, and pulled down as a dangerous structure. It was held that the defect was caused by the natural operation of time and the elements upon a house the original construction of which was faulty, and that the lessors were not entitled under the covenant to recover from the lessees the cost of rebuilding the house.

Where a property is bought in possession, a purchaser buys with the knowledge that the amount of his purchase-money will be regulated by the state of repairs of the house. He will not, therefore, be entitled to the benefit of repairing covenants of a former lessee of the premises, although the vendor may be entitled to recover dilapidations (s).

A general covenant to repair, and a particular covenant to repair upon notice, may be independent and distinct covenants. Where a lessee covenanted "to repair the premises at all times as occasion should require, and at furthest, within three months after notice of any decay or want of reparation," this was held to be one covenant (t). But where the covenant was "from time to time during the term, after three months' notice, to sufficiently repair, and at the end of the term leave sufficiently repaired," the covenants were held distinct, and the lessee was, without notice, bound to leave the premises repaired (u).

Notice of the repairs needed should be served on the

General and
particular.

(s) *Re Edie and Brown*, W. N. (1888) p. 20.

(t) *Horsfall v. Testar*, 1 Moore, 89.

(u) *Harlet v. Butcher*, Cro. Jac. 640; cf. *Wood v. Day*, 1 Moore, 389; *Roe v. Paine*, 2 Camp. 520.

person who has covenanted to repair. Thus, where a tenant sued his landlord for breach of an agreement to keep drains in repair, and the jury found that, though neither party knew of the defect, the plaintiff had not, and the defendant had means of learning it, the defendant, in the absence of notice, was held not to be liable (*x*).

As to the notice to be given under the Conveyancing and Law of Property Act, 1881 (*y*), s. 14, see *post*, Chapter VII. (*z*).

Notice to repair, "in accordance with the covenants of the lease," is no waiver of forfeiture for breach of the general covenant to repair (*a*), but notice to repair within three months might delude the tenant, and therefore amount to waiver (*b*).

An assignee of a reversion can bring ejectment for breach of a covenant to repair without giving the tenant notice of the assignment (*c*).

Measure of
damages.

When there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises in the state of repair in which they ought to have been left. The measure of damages is not affected if, by reason of the terms of the lease granted to another lessee after the expiration of the term, the lessor is at the time of action brought no worse off than he would have been if there had been no breach of covenant (*d*).

During the currency of a lease, the lessor sued for damages for breach of the covenant to keep in repair, and accepted £235 paid into Court as sufficient to satisfy his

(*x*) *Hugall v. McLean*, 53 L. T. Rep. 94.

(*y*) 44 & 45 Vict. c. 41.

(*z*) P. 139.

(*a*) *Few v. Perkins*, L. R. 2 Exch. 92; *Roe v. Payne*, 2 Camp. 520.

(*b*) *Doe d. Morecraft v. Meux*, 4 B. & C. 606; *Few v. Perkins*, L. R. 2 Exch. 92, p. 95, per Kelly, C. B.

(*c*) *Scaltock v. Harston*, 1 C.P.D. 106.

(*d*) *Joyner v. Weeks*, (1891) 2 Q. B. A. 31.

claim. After the determination of the lease the lessor brought a fresh action for breaches of the covenants to repair and yield up in repair. It was held that the money paid into Court in the first action was paid in as damages for the injury to the reversion, and not as the sum required to put the premises in repair, and that the damages were accurately assessed by deducting the £235 from the sum required to put the premises in repair at the expiration of the lease (e).

Covenant to Pay Rates, Taxes, &c.

A lease usually contains an express covenant for the payment of rates, taxes, &c., except land tax. A covenant by the tenant to pay land tax is valid, but it was once thought that it must be express. Thus in *Cranston v. Clarke* (f), where rent reserved in a lease was to be paid "without any deduction or abatement whatsoever," it was held that the lessee had a right to deduct money paid by him for land tax. But where a grant of a fee farm rent was made "without any deduction, defalcation, or abatement for or in any respect whatsoever," it was held that the grantee was entitled to receive the full rent without deducting the land tax (g). The better opinion seems to be that a covenant to pay taxes generally includes land tax as well as other parliamentary taxes (h).

In *Parish v. Sleeman* (i), there was an agreement to demise a farm for fourteen years "at the yearly rent of £40, payable quarterly free of all outgoings," and by which the parties agreed to grant and accept a lease on the above and other usual terms. It was held that the

(e) *Henderson v. Thorn*, (1893) 2 Q. B. 164.

(f) *Sayer*, 78.

(g) *Bradbury v. Wright*, 2 Doug. 624; cf. *Bennett v. Womack*, 7 B. & C. 627.

(h) *Hopwood v. Banford*, 11 Mod. 237; *Amfield v. White*, 1 R. & M. 246; *Manning v. Lunn*, 2 C. & K. 137.

(i) 1 De G. F. & J. 326.

General
covenant
includes
land tax.

landlord was entitled to a net rent payable free of land tax and tithe commutation rent-charge. A covenant to pay all parliamentary taxes, assessments, &c., will extend to land tax which has been purchased by a former lessee (*k*).

In *Blandford v. Marlborough* (*l*), it was held that a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise, included land tax.

Tithe rent-charge.

A covenant to pay all taxes and assessments whatsoever in respect of the demised premises except the level tax, property tax, and land tax, did not include tithe rent-charge (*m*).

Now by the Tithe Act, 1891 (*n*), tithe rent-charge is payable by the owner of the lands, notwithstanding any contract between an occupier and owner of such lands, and any contract made between an occupier and owner of lands, after the passing of the Act, for the payment of tithe rent-charge by the occupier is void.

Landlord's property tax.

In *Denby v. Moore* (*o*), an occupier of lands during twelve years paid to the collector of taxes the landlord's property tax, and also paid the landlord the full rent as it became due, without claiming any deduction for the tax so paid. It was held that he could not recover back from the landlord any part of the property tax so paid. "The plaintiff was certainly warranted in the payment which he at first made in redemption of his goods, which, but for such payment, might have been distrained upon. But when he went with the money for the purpose of paying to his landlord the next rent which became due, he ought to have then made the deduction. This, however, he did not choose to do, but paid the sum of £10 more than was necessary. It was, therefore, *quoad* that sum, a voluntary payment on his part. It does not appear what might

Should be deducted from next payment of rent.

(*k*) *Governors of Christ's Hospital v. Harrild*, 2 M. & G. 707; 3 Scott, N. R. 126.

(*l*) 2 Atk. 562.

(*m*) *Jeffrey v. Neale*, L. R. 6 C. P. 240.

(*n*) 54 & 55 Vict. c. 8, s. 1.

(*o*) 1 B. & Ald. 123.

be the reason which induced him so to act, but it was a voluntary payment. . . . I go on its being a voluntary payment, and I know of no principle of law which gives him a right to recover back money so paid" (*p*).

Similarly, "The Land Tax Acts require three things: Land tax. first, that the tenant should pay the tax; secondly, that he should deduct it (and he is not only allowed, but required to do so); thirdly, that the landlord should allow the deduction on the receipt of the residue of the rent" (*q*). It was held, therefore, that land tax and paving rates paid during the six years could not be recovered back from the landlord in any subsequent year, not having been deducted, as they ought to have been, from the rent of each current year.

In *Direct Spanish Telegraph Company v. Shepherd* (*r*), a Water rate. lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was supplied to the lessee, who paid for it, and sued the lessor to recover the amount so paid, and succeeded.

But in *Badcock v. Hunt* (*s*), the correctness of this decision was doubted, although, owing to the difference of wording in the covenant, it was not directly overruled. In the latter case a lessor covenanted to pay all rates, taxes and impositions whatsoever, whether parliamentary, parochial or imposed by the Corporation of the City of London or otherwise howsoever which then were or thereafter might be rated, charged or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner or tenants in respect thereof. Water was supplied to the demised premises for domestic purposes by the New River Company under the provisions of the Waterworks Clauses Act, 1847 (*t*), and the lessees,

(*p*) *Ib.* p. 128, per Lord Ellenborough, C. J.; cf. *Brisbane v. Dawes*, 5 Taunt. 143.

(*q*) *Andrew v. Hancock*, 1 Brod. & B. 37; cf. *Stubbs v. Parsons*, 1

B. & Ald. 516; *Atwood v. Lamprey*, 3 P. Wms. 127, n.

(*r*) 13 Q. B. D. 202.

(*s*) 22 Q. B. Div. 145.

(*t*) 10 & 11 Vict. c. 17.

after paying the water rate, sought to recover the amount so paid from the lessor. It was held that they were not entitled to recover. "The question appears to me to be whether this water rate can be said to be a rate or imposition 'imposed' within the meaning of these words. I do not think that it can. I do not think that a charge to which a person can only be made liable with his own consent can be said to be imposed upon him within the meaning of the covenant. If a man buys things in a shop, the liability to pay the price may be said, in one sense, to be imposed upon him by law, but that is not, in my opinion, the sense in which 'imposed' and 'imposition' are used in this covenant" (*u*).

Under a covenant by the lessor, in a lease, to pay "all water rate imposed or assessed upon the premises, or on the lessor or lessees in respect thereof," the lessor is not bound to pay for water supplied by the water company to the lessees for trade purposes (*x*).

A general covenant to pay rates and taxes will not, *in the absence of express stipulation*, include charges thrown upon the owner by law.

Tidswell v.
Whitworth.

By the Manchester Improvement Act, 1851, the council are empowered to order streets to be sewered and paved, and "thereupon the respective owners of the houses and grounds lying alongside or adjoining the street shall well and sufficiently sewer, pave, &c., the same," and, by way of additional remedy, the council might require payment from the tenant or occupier to be levied by distress, and it was made compulsory on the owner to allow such payment to be deducted from the rent. In 1863 premises in Grafton Street were demised to the defendant by the plaintiff for seven years. In 1865 the corporation gave notice of its intention to have Grafton Street levelled and paved. The plaintiff, as owner of the property, neglecting to do the

(*u*) 22 Q. B. Div. p. 148, per Lord Esher.

(*x*) *Re Floyd*, (1897) 1 Ch. A. 633.

required work, the council did it, and assessed the proportion payable by the plaintiff at £213 3s. 6d. The plaintiff paid that sum, and now sought to recover it from the defendant, who had covenanted in the lease "to pay and discharge all taxes, rates, assessments and impositions whatsoever (except property or income-tax in respect of the said rent) which during the term should become payable in respect of the demised premises." It was held that, the payment having been made by the plaintiff for breach of a duty imposed on him by Act of Parliament, and not for a rate, assessment or imposition which had become payable in respect of the demised premises, he was not entitled to call upon the defendant to pay him the amount (y).

In *Rawlins v. Briggs* (z), upon a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement, except land-tax and landlord's property tax," and further, "to pay and discharge all and all manner of taxes, rates, charges, assessments and impositions whatever (except as aforesaid) then, or any time or times during the term to be charged, assessed, or imposed on the premises thereby demised, or in respect thereof, or of the said rent as aforesaid, by authority of Parliament or otherwise howsoever." During the term, the lessor received a notice under the Public Health Act, 1875 (a), to abate a nuisance injurious to health, arising from the bad condition of the drains upon the premises, and, in order to prevent proceedings against him, executed the works required. It was held that he was not entitled to call on the lessee, under his covenant, to repay the amount.

Where the covenant was to pay "all rates, &c. charged, assessed, or imposed upon the demised premises, or the occupier or tenant in respect thereof," the proportion of

(y) *Tidswell v. Whitworth*, L. R. 2 C. P. 326.

(z) 3 C. P. D. 368.

(a) 38 & 39 Vict. c. 55, s. 94.

the expense of paving the street was held not to be payable by the tenant under his covenant (b).

Permanent charges.

In *Wilkinson v. Collyer* (c), the distinction was taken between recurring charges and charges imposed upon the owner for the permanent improvement of his property. In *Budd v. Marshall* (d), Bramwell, L. J., disapproved of this distinction.

"Willes, J., in *Thompson v. Lapworth* (e), spoke of the argument as captivating, that it was an injustice to the tenant who has only a limited interest to be compelled to bear the whole burden for his landlord's benefit; but the answer is that under a lease for ninety-nine years the tenant would gain substantially the whole benefit" (f).

The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing and future taxes, rates, assessments, land-tax, tithe, or tithe rent-charge, and outgoings of every description for the time being payable either by landlord or tenant in respect of the said premises." It was held that the covenant included the owner's proportion of the cost of paving the street under the Metropolis Local Management Act, 1862 (g), on the ground of its exceedingly comprehensive words (h).

No covenant to repair.

A tenant may be liable even if there is no repairing covenant. In *Foulger v. Arding* (i), a lessee covenanted to "pay and discharge all taxes rates including sewers main drainage assessments and impositions whatsoever which now are or which at any time or times hereafter during the continuance of the said term hereby granted be taxed rated assessed charged or imposed upon or in respect of the said premises or any part thereof on the landlord

(b) *Allum v. Dickinson*, 9 Q. B. Div. 632; cf. *Baylis v. Jiggins*, (1898) 2 Q. B. 315; *Lumby v. Faupel*, 51 W. R. 522.

(c) 13 Q. B. D. 1.

(d) 5 C. P. Div. 481.

(e) L. R. 3 C. P. 149, pp. 157, 158.

(f) 5 C. P. Div. p. 487.

(g) 25 & 26 Vict. c. 102, s. 96.

(h) *Aldridge v. Ferne*, 17 Q. B. D. 212.

(i) (1902) 1 K. B. A. 700.

tenant or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair. Notice was given to the lessor, under the Public Health Act (London), 1891 (*k*), to abate a nuisance caused by a defective privy, and to construct a water-closet, and it was held that he was entitled to recover the sum paid in complying with the notice from the lessee.

A lessee covenanted to pay, bear, and discharge all land-tax, sewers rate, main drainage rate, and all other rates, taxes, assessment charges or impositions whatsoever, parliamentary, parochial or otherwise, taxed, charged, assessed or imposed on the demised premises, or on the lessor for or in respect of the premises. The lessee also covenanted to repair. In consequence of the failure of the lessee to repair, a drain on the premises got out of order and caused a nuisance, and the sanitary authority made an order under the Public Health (London) Act, 1891 (*l*), directing the lessor to repair it. The lessor sued the lessee to recover the expenses incurred in complying with the order, and it was held that the expenses so incurred were a charge imposed on the lessor in respect of the premises, and he was entitled to recover (*m*).

To make the tenant liable in respect of payments imposed by statute primarily upon the landlord some special words indicating an intention to charge the tenant must be used.

Special words
make tenant
liable.

In *Brett v. Rogers* (*n*), a lessee covenanted to "pay the land-tax, sewers rate, and all other taxes, rates, duties, assessments and impositions, parliamentary, parochial or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the demised premises." Shortly after the commencement of the lease the sanitary authority served a notice on the

(*k*) 54 & 55 Vict. c. 76.

2 Q. B. 53; cf. *Re Bettingham*, 9 Times R. 48.

(*l*) *Ib.*

(*m*) *Smith v. Robinson*, (1893)

(*n*) (1897) 1 Q. B. A. 525.

plaintiff, as owner, under the Public Health (London) Act, 1891, directing him to abate a nuisance on the premises, and for that purpose to take up a defective drain and lay a new drain throughout the premises. The plaintiff incurred expenses in complying with the notice, and sued the lessee to recover the amount. It was held that the obligation to lay the new drain was a duty imposed in respect of the premises, and that the lessee was liable to pay to the plaintiff the amount expended in complying with the notice of the sanitary authority.

In *Farlow v. Stevenson* (o), a tenant covenanted with his landlord to pay and discharge "all taxes, rates, duties and assessments whatsoever which now are or hereafter shall become payable for or in respect of the premises hereby demised or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property-tax." The lease was dated the 13th March, 1895, and was for twenty-one years, determinable by the tenant at the end of the first seven or fourteen years. On the 3rd November, 1897, the vestry gave notice to reconstruct a drain, in accordance with sect. 85 of the Metropolis Management Act, 1855 (p). The work was carried out, and cost £143, and it was held that under this covenant the tenant was liable.

"If the language used here had not been wider than the language used in that case (*Tidswell v. Whitworth*) (q), it would have caused considerable difficulty. But the language used here is wider, and if we look at the cases decided since *Tidswell v. Whitworth* (r), we cannot help seeing that the language used in the present case is such as to take it out of *Tidswell v. Whitworth* (r). . . . In every case in which the word 'duties' has been introduced into such a covenant, the construction has been against the tenant and in favour of the landlord" (s).

(o) (1900) 1 Ch. A. 128.

(p) 18 & 19 Vict. c. 120.

(q) L. R. 2 C. P. 326.

(r) *Ib.*

(s) *Farlow v. Stevenson*, (1900) 1 Ch. A. 128, p. 140, per Lindley, M. R.

In *Thompson v. Lapworth* (t), a covenant to pay and discharge "all taxes, rates, duties and assessments whatsoever, which during the continuance of the demise should be taxed, assessed or imposed on the tenant or landlord of the premises demised in respect thereof," was held to include paving, in compliance with a notice under the Metropolis Management Act, 1855 (u), as being a duty within the covenant.

A lessee was bound to "bear, pay and discharge . . . all other taxes, rates, duties and assessments whatsoever, whether parliamentary, parochial or otherwise." The drainage became defective, and the lessors were required to abate the nuisance, which they did. It was held that they were entitled to recover the cost from the lessee (x).

A lessee covenanted to pay "all rates, taxes, charges and assessments whatsoever, which now are or may be charged or assessed on the premises, or any part thereof, or upon any person or persons in respect thereof, land-tax and property tax excepted." The local board of health gave notice to the plaintiff, as owner, to sewer, level, pave, &c. the street, and did the work and made an apportionment, which he was compelled to pay. It was held that this was a charge upon the premises, or upon a person in respect thereof, from which the lessee undertook to relieve the plaintiff (y).

In *Re Warriner* (z), a landlord let a house to a tenant for three years at the "clear yearly rent" of £54, to be paid "free and clear of and from all deductions whatsoever," property tax excepted. The tenant covenanted to pay the rent and to pay and discharge "all rates, taxes, assessments and impositions whatsoever, whether parliamentary, parochial or otherwise," that might become due

(t) L. R. 3 C. P. 149; cf. *Wix v. Rutson*, (1899) 1 Q. B. 474.

(u) 18 & 19 Vict. c. 120, s. 105.

(x) *Budd v. Marshall*, 5 C. P. Div.

481.

(y) *Hartley v. Hudson*, 4 C. P. Div. 367.

(z) (1903) 2 Ch. 367.

or assessed in respect of the premises during the tenancy, property tax excepted, and to keep the premises in as good repair as at the commencement of the tenancy, fair wear and tear excepted. The landlord covenanted to keep the main walls and roof in repair during the tenancy. It was held that the duty and expense of complying with a notice from the sanitary authority to reconstruct the drains constituted an "imposition" within the agreement, which fell on the tenant notwithstanding the absence of such words as "imposed on the landlord or tenant," and notwithstanding the shortness of the tenancy.

In *Stockdale v. Ascherberg* (a), a house was let for the term of three years, the tenant agreeing to pay all "outgoings payable in respect of the premises." During the tenancy the landlord, in obedience to an order from the sanitary authority, reconstructed the drainage system of the house. It was held that the shortness of the term was no reason for putting a more limited construction upon the expression "outgoings" than that which would have been put upon it in a lease for a longer period, and that the tenant was liable under his agreement to recoup the landlord the expense of the drainage work.

In *Valpy v. St. Leonards Wharf Co.* (b), there was a lease of a cottage from year to year at a rent of £20, and it was held that a covenant by the tenant to pay outgoings did not include the cost of paving a yard in obedience to a notice from the local authority at a cost of £58.

"But all that case comes to is this—that the learned judge, applying the principle laid down by Collins, M. R., in *Foulger v. Arding* (c), came to the conclusion that the expense of paving the yard could not be held to have been within the contemplation of the parties to a tenancy from year to year at a rent of £20" (d).

In *Batchelor v. Bigger* (e), where the lease was for three

(a) (1904) 1 K. B. A. 447.

(b) 1 L. G. R. 305.

(c) (1902) 1 K. B. A. 700.

(d) (1903) 1 K. B. p. 877, per

Wright, J.

(e) 60 L. T. Rep. 416.

years at a rent of £75, it was held that the payment of £68 15s. 11d. for the landlord's share of paving the street came within the expression "outgoings"; and Kay, J., said: "It is extremely difficult to say that a covenant, the words of which would, in the case of a term for twenty-one years, include a payment by the tenant, must be construed not to include it because the term is only for three years" (f).

In *Harris v. Hickman* (g), a tenant having a three years' lease of a house at £70 a year, covenanted to pay all outgoings whatsoever in respect of the premises, and to keep the inside in repair. At the termination of the lease the tenant held over, and an expense of £70 1s. 6d. was incurred by the landlord in abating a nuisance that had arisen during such holding over. It was held that the tenant was not liable for this sum, as such liability could not have been within the contemplation of the parties, as a covenant to pay such outgoings could not be applicable to a yearly tenancy.

Covenants to Insure.

A Court of Equity could not, until empowered by statute, relieve against forfeiture incurred by breach of a covenant to insure (h). But a covenant by the lessee to insure the demised premises in the names of himself and the lessor, although not performed literally by an insurance in the name of the lessor only, was substantially performed for the benefit of the lessor, so that he could not recover for a breach of the covenant (i).

Formerly no relief in equity.

By 22 & 23 Vict. c. 35, s. 4, it was enacted that "the Court shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has

(f) 60 L. T. Rep. p. 418.

(g) (1904) 1 K. B. 13.

(h) *Reynolds v. Pitt*, 19 Ves.

134; *White v. Warner*, 2 Mer. 469;

Gregory v. Wilson, 9 Hare, 683.

(i) *Havens v. Middleton*, 10 Hare, 641.

happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure upon such terms as to the Court may seem fit."

Where a tenant had allowed judgment for ejectment to go by default, and then filed a bill for relief, the Court relieved against the judgment on payment by the plaintiff of the taxed costs at law, the arrears of rent, the amount due for repairs and insurance, and £50, the costs in equity, and ordered the defendant to account for the rent (*k*). Relief granted was recorded (*l*); the same person was not to be relieved more than once in respect of the same covenant (*m*); the lessor was to have the benefit of an informal insurance (*n*), and a purchaser was protected where there was an insurance subsisting at the completion of the purchase against prior breach of which he had no notice (*o*).

By the Common Law Procedure Act, 1860 (*p*), the Courts of Common Law were empowered to give relief in a summary way in all cases in which relief might be obtained in Chancery under 23 & 24 Vict. c. 35.

The Conveyancing and Law of Property Act, 1881 (*q*), repealed 23 & 24 Vict. c. 35, so that the special relief given to a purchaser of leaseholds in respect of insurance is taken away. Relief must now be obtained under that Act (*r*).

(*k*) *Bamford v. Creasy*, 3 Giff. 675; cf. *Page v. Bennett*, 2 Giff. 117.

(*l*) 22 & 23 Vict. c. 35, s. 5.

(*m*) *Ib.* s. 6.

(*n*) *Ib.* s. 7.

(*o*) *Ib.* s. 8.

(*p*) 23 & 24 Vict. c. 126, s. 2.

(*q*) 44 & 45 Vict. c. 41, s. 14 (7).

(*r*) *Post*, p. 138.

Covenants for Renewal.

Where the lessor covenants to renew under the same covenants, this is exclusive of the covenant for renewal (s).

"The Courts, in England at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that it does mean it" (t). But in *Furnival v. Crew* (u), where the covenant was, on payment of £68 for every life added or renewed, to execute one or more lease or leases under the same rents and covenants, and so to continue the renewing of such lease or leases, Lord Hardwicke thought that the lessee was entitled to a new lease with a covenant for renewal, and decreed specific performance (x).

Where it was covenanted to renew whenever any life or lives dropped, provided that if the lessee, upon or after the death of any of the life or lives, should refuse or neglect to renew the said lease, or make application therein, &c., the lessee was held liable to be ejected for not applying when the first life dropped (t).

And where, in a lease for sixty-one years, the lessor covenanted with the lessee to grant a further lease for twenty-one years, within one year after the expiration of twenty years of the said term, on the request of the lessee, &c., and so, in like manner, at the end of every twenty years during the term, the lessee was held bound to apply for renewal at the expiration of the first twenty-one years (y).

(s) *Tritton v. Foote*, 2 Bro. C. C. 636; *Russel v. Darwin*, *Ib.* 639, n.; *Hyde v. Skinner*, 2 P. Wms. 190; *Moor v. Foley*, 6 Ves. 232.

(t) *Baynham v. Guy's Hospital*, 3 Ves. 298.

(u) 3 Atk. 83; cf. *Bridges v. Hitchcock*, 5 Bro. P. C. 6 (Toml.), where there was not only a cove-

nant to grant under the same covenants, but to grant "such further lease as the lessee should desire"; 7 East, p. 245.

(x) Cf. *City of London v. Milford*, 14 Ves. p. 52; *Hare v. Burges*, 4 K. & J. 45.

(y) *Rubery v. Jervoise*, 1 T. R. 229.

No relief could be obtained in equity against such laches as not applying within the prescribed period (z).

A covenant for renewal is not within the rule against perpetuities (a).

A covenant for perpetual renewal, entered into by a person holding a limited interest in lands, does not bind the estate beyond that interest; and therefore, if his assignee acquires the inheritance, it is not bound by the covenant (b).

A covenant by a lessor that he would renew at the end of his term has been adjudged to run with the land, and bind the grantee of the reversion (c).

But if the covenant for renewal is by a lessee who has merely a reversion from the freeholder, the covenant will not affect the estate, but only the reversion vested in the covenantor at the time of the covenant (a).

By a lease, dated the 26th June, 1833, certain premises were demised to Reid for eighty years from the 29th September, 1822. By an underlease, dated the 29th December, 1840, Reid demised the premises to Austin for sixty-two years from the 29th September, 1840, less ten days. By an underlease, dated the 25th June, 1851, Austin demised to Fisher for fifty-two years, less twenty days, from the 29th September, 1850, and covenanted for himself, his executors, administrators and assigns with Fisher, his executors, administrators and assigns, that, in case Austin should obtain any extension of the term for which he then held the premises, he, his executors, administrators or assigns would grant Fisher a new lease of the premises for such extended term, less ten days.

(z) *Allen v. Hilton*, 1 Fonb. Eq. 452; cf. 14 Ves. 52, p. 58; *Redshaw v. Bedford Level Company*, 1 Eden, 348, n.

(a) *London and South Western Railway Company v. Gomm*, 20 Ch. Div. 562, p. 579.

(b) *Brereton v. Tuohey*, 8 Ir. C. L. Rep. 190; cf. *Kent v. Stoney*, 9 Ir. Ch. Rep. 249; *Coey v. Pascoe*, (1839) 1 I. R. 125.

(c) *Roe v. Hayley*, 12 East, 464, p. 469, per Lord Ellenborough, C. J.

Austin died in 1854, having bequeathed the premises to persons who assigned to Trafford in 1897. In 1899 Trafford surrendered his interest under the lease of 1840, and accepted a new lease for the term of fifty years. Fisher died in 1892, and his executors assigned the residue of the underlease of the 25th June, 1851, to the plaintiff, who sued for specific performance of the covenant to renew. It was held that the covenant was personal, and not binding on Austin's representatives, and, even assuming it to be a covenant for renewal, it only ran with the reversion vested in the covenantor at the time he entered into the covenant (*d*).

By a covenant for renewal in a lease for years the lessor covenanted at any time during the term, upon the request and "at the costs of the lessee," to renew the lease for a further term upon payment of a fine calculated (in part) upon the full improved value of the premises at the time of renewal, such value to be determined by the landlord's surveyor, or at the option of the lessee, by the award of two referees or their umpire. The lessee having required a renewal of the lease, and the parties being unable to agree as to the amount of fine, the question of the improved annual value of the premises at the time of the renewal was referred to two referees or their umpire, and the umpire made an award. It was held that the costs of the reference and award were payable by the lessee under the covenant as necessary costs of renewal (*e*).

A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the *cestui que trust*, will be held upon trust for the person entitled to the old lease (*f*).

Who is
entitled to
the benefit
of renewal.

"There are, no doubt, many cases in which the pre-

(*d*) *Muller v. Trafford*, (1901) 1 (1904) A. C. 46.

Ch. 54.

(*f*) *Keech v. Sandford*, Sel. Cas.

(*e*) *Fitzsimmons v. Lord Mostyn*, Ch. 61; 1 W. & T. L. C.

sumption of personal incapacity to retain the benefit is one of law, and cannot be rebutted. The simplest instance is that of a trustee, as in *Keech v. Sandford* (g). But the principle has been extended to cover other persons who are not primarily trustees at all; as, for instance, tenants for life towards those in remainder. The foundation of the presumption in their case is that they can take only what the will or settlement under which they make title gives them, and that a renewal must be looked on as an accretion to, or graft upon, the original term arising out of the goodwill or quasi-tenant right annexed thereto, and that their rights to such accretion are those which they have in the term and no greater, and terminate with their own life (h).

"But there is another class of cases in which, as it seems to me, there is no presumption of law, but at most a rebuttable presumption of fact. In this class, apparently, are mortgagees (*Rushworth's Case* (i)), joint tenants (*Palmer v. Young* (j)), and partners (*Featherstonhaugh v. Fenwick* (k)). *Prima facie* a mortgagee cannot renew for himself; he cannot hold the accretion any more than he can hold the term itself free from the right to redeem; the reason here is analogous to that which governs the rights of tenants for life. But in this case the presumption is apparently rebuttable; and in *Nesbitt v. Tredennick* (l) Lord Manners held that it was rebutted. . . . As to partners: 'It is clear,' says Sir W. Grant in *Featherstonhaugh v. Fenwick* (m), 'that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises where the joint trade is carried on for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the part-

(g) *Keech v. Sandford*, Sel. Cas. Trusts (10th ed.), p. 193.

Ch. 61; 1 W. & T. L. C.

(i) Freem. 13.

(h) *Tastor v. Marriott*, Amb. 668;

(j) 1 Vern. 276.

Rawe v. Chichester, Amb. 715, 720;

(k) 17 Ves. 298.

James v. Dean, 11 Ves. 393, 395,

(l) 1 Ball & B. 29.

and other cases cited Lewin on

(m) 17 Ves. 298, 311.

nership.' And he then proceeds to examine the facts on that basis, and finds unfair dealing in fact. A joint tenant who is not a partner can be under no higher obligation. Tenants in common do not stand in a fiduciary relation to each other (*Kennedy v. De Trafford* (n)); and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole.

"The reason of the rule in the case of trustees and others whose liability is absolute and irrebuttable is said to be public policy (*Griffin v. Griffin* (o), per Lord Redesdale; *Blewett v. Millet* (p)), and is based, it would seem, largely on the fact that possession gives to such person an opportunity of renewal (*Pickering v. Voules* (q), per Lord Thurlow), acting upon the goodwill that accompanies it (*James v. Dean* (r), per Lord Eldon). It may well be, therefore, that different considerations apply in the case of persons not in possession" (s).

In *Re Biss* (t), a lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During the tenancy the lessee died intestate, leaving a widow and three children, one being an infant. The widow took out administration to her husband's estate, and she and the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow and son each applied for a new lease for the benefit of the estate, which the lessor refused to grant, but, having determined the yearly tenancy by notice, he granted the son personally a new lease at an increased rent. The administratrix

(n) (1897) A. C. 180.

(o) 1 Sch. & Lef. 352, 354.

(p) 7 Bro. P. C. 367.

(q) 1 Bro. C. C. 197, 198.

(r) 11 Ves. 383, 395.

(s) *Re Biss*, (1903) 2 Ch. A. 40, p. 56, per Collins, M. R.

(t) (1903) 2 Ch. A. 40.

applied to have the new lease treated as having been taken for the benefit of the estate. Buckley, J., on the authority of *Ex p. Grace* (u), held that the son was a trustee of the new lease. On appeal, however, it was held that the lessor had determined all hope of renewal before the son had intervened, and that the son stood in no fiduciary relation to the other persons interested in the estate, and that he was entitled to retain the lease for his own benefit.

Covenant to Reside.

A covenant in a lease that the lessee, his executors and administrators, shall constantly reside upon the demised premises during the term, is binding on the assignees of the lease, though unnamed (x). "Such a covenant is, in fact, that the owner of the lease for the time being shall reside on the premises, and that they are not to be shut up or deserted" (y).

Where there was a lease for twenty-one years, if the tenant, his executors, &c., should so long continue to inhabit and dwell in the farmhouse, and occupy the lands, and not assign, it was held that actual occupation was a condition annexed to the lease, and that the term ended on the bankruptcy of the lessee, and the sale of the lease by the assignees in bankruptcy (z). But see now Conveyancing and Law of Property Act, 1892 (a).

Where an agreement for a lease of a public-house contained no reference to the covenants to be inserted in the lease, it was held that the lessor could not insist upon the insertion of a covenant to reside on the premises and personally conduct the business (b).

(u) 1 Bos. & P. 376.

(x) *Tatem v. Chaplin*, 2 H. Bl. 133.

(y) *Dav. Prec.* 2nd ed. vol. v. p. 117.

(z) *Doe v. Clarke*, 8 East, 185;

cf. *Doe v. Carter*, 8 T. R. 579, 300; *Doe v. Hawke*, 2 East, 481.

(a) 55 & 56 Vict. c. 13, s. 2 (2), *post*, p. 141.

(b) *Re Lander and Bagley's Contract*, (1892) 3 Ch. 41.

Though not a usual covenant, such a covenant is fair and proper (c). As to what is residence, see *Walcot v. Botfield* (d).

Covenants of Indemnity on Assignment.

An assignee of a lease is bound to covenant with the assignor to indemnify him against the payment of rent and the performance of covenants; and there is no distinction between the case of assignment by the original lessee and by an assignee of that original lessee, the propriety of enforcing that covenant being as manifest in the case of the assignee, that he may be indemnified in respect of his parting with the possession, out of which his duty to pay the rent accrues, independent of actual covenant, as in the case of assignment by the original lessee. And this is so even if the assignor is unable to give a covenant for title, *e.g.*, if he is an executor (e).

But where the assignment takes place by operation of law, so that the assignees have entered into no covenant, and will be free from all liability when they have parted with the possession of the estate, no indemnity against the payment of rent and the performance of covenants can be required (f).

An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenants in the lease committed during the continuance of his own tenancy, and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor (g).

In a suit by the assignor of a lease upon a covenant of indemnity, the Court will not make a general declaration

(c) *Ponsonby v. Adams*, 2 Bro. 8, p. 18.
P. C. 431. (f) *Wilkins v. Fry*, 1 Mer. 264.
(d) *Kay*, 534, per Wood, V.-C. (g) *Moule v. Garrett*, L. R. 7
(e) *Staines v. Morris*, 1 V. & B. Exch. 101.

of the right to indemnity, with liberty to apply from time to time in case of further breach, but will merely direct payment on account of breaches already committed (*h*).

Notice.

Notice of a lease is not constructive notice of onerous covenants therein contained, unless the grantee has had a fair opportunity of ascertaining such provisions (*i*). And this principle applies to an agreement to purchase an existing lease as well as to an agreement to take an underlease.

Thus where the plaintiff agreed to take leases of certain plots of land subject to onerous covenants, and, after building a house on one of them, agreed to sell it to the defendant for the residue of the term, and the defendant, on ascertaining the covenants to be unusually onerous, refused to complete, it was held that he was justified in so refusing (*k*).

In *Hyde v. Warden* (*i*), the question arose whether the taking possession of property agreed to be underleased, with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The Court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases, including that of *Cosser v. Collinge* (*l*).

The Court rejected the argument, and said: "We think it may be considered as settled that the principle of that case can only be applied where (as indeed was the case in *Cosser v. Collinge* (*l*)) the defendant had a fair opportunity for ascertaining for himself the provisions of the original lease" (*m*).

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| (<i>h</i>) <i>Lloyd v. Dimmack</i> , 7 Ch. D. | Div. 523. |
| 398. | (<i>l</i>) 3 M. & K. 283. |
| (<i>i</i>) <i>Hyde v. Warden</i> , 3 Exch. | (<i>m</i>) 3 Exch. Div. p. 80; cf. |
| Div. 72. | <i>Grosvenor v. Green</i> , 28 L. J. Ch. |
| (<i>k</i>) <i>Reeve v. Berridge</i> , 20 Q. B. | 173; <i>Smith v. Capron</i> , 7 Hare, 185. |

"It is, I think, now well established that, whether the sale be by private contract or public auction, it is the duty of the vendor to disclose the existence of onerous and unusual covenants contained in the leases of the leasehold property sold, or at least to afford the purchaser an opportunity of inspecting the leases" (n).

In *Molyneux v. Hawtrey* (o), negotiations for the purchase of a lease were begun on the 9th December, 1901. On the 12th December the solicitor for the defendant called on the solicitor for the plaintiff, and asked about the lease his client proposed to purchase. The defendant's solicitor said that the lease was deposited somewhere else, and could not be got at for some days, but offered a lease of some adjoining property, the terms of which were the same as those of the lease of the property in question. The defendant's solicitor said that he was pressed with other work, and could not look at the document at that time. The plaintiff brought an action for damages for breach of contract to take an assignment of the lease. The defence was that the lease contained unusual and onerous covenants, of which the defendant had no notice. It was held that the defendant, not having had notice of the existence of the unusual and onerous covenants in the lease, or any fair opportunity of inspecting the lease, was not bound by the contract.

Where, on a sale of leaseholds by auction, the particulars and conditions of sale contained no statement as to the nature of the covenants in the lease (which were in fact onerous), nor any notice that the lease might be inspected at the office of the vendor's solicitors, or elsewhere, it was held that the purchaser was not affected with constructive notice of the covenants, and that he had not had a fair opportunity of inspecting the lease, and was therefore not bound to complete the contract (p).

(n) *Re Haedicke and Lipski's Contract*, (1901) 2 Ch. 666, per Byrne, J.

(o) (1903) 2 K. B. A. 487.

(p) *Re White and Smith's Contract*, (1896) 1 Ch. 637.

CHAPTER VI.

COVENANT NOT TO ASSIGN.

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Such a cove-
nant is valid.

A POWER of assignment is incident to the estate of a lessee, unless expressly restrained (*a*); but a covenant not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment (*b*).

Reasonable
but not usual.

A covenant not to assign without licence is not an unreasonable covenant (*c*), but does not come within a contract to grant a lease "with all common and usual covenants," though the subject of the demise is a public-house (*d*).

(*a*) *Church v. Brown*, 15 Ves.
264.

(*b*) *Greenaway v. Adams*, 12 Ves.
396.

(*c*) *Haberdashers' Company v.*
Isaacs, 3 Jur. N. S. 611.

(*d*) *Henderson v. Hay*, 3 Bro.
C. C. 632; cf. *Jones v. Jones*, 12

In *Folkingham v. Croft* (e), it was held that a covenant not to assign is implied in such a contract "where the custom of the place is not generally against it." But this was dissented from in *Church v. Brown* (f), and must be considered as overruled.

An agreement to accept a lease of a dwelling-house in London, to contain all usual covenants and provisoes, will not justify the insertion of a covenant not to assign without the lessor's consent (g).

Where there was an agreement for the lease of a public-house, but no reference was made to the covenants to be inserted therein, it was held that the lessor could not insist on a covenant not to assign without consent (h).

A restriction on alienation without licence in a lease to one, his executors, administrators and assigns, is not repugnant, the construction being such assigns as he may lawfully have, *i.e.*, by licence or by law (i). Not repugnant.

Covenants restraining lessees from alienation without licence are jealously watched (j).

A restriction on assignment, however generally expressed, will not prevent underletting (k); but this may be done by appropriate words, *e.g.*, not to "set, let, or assign over" (l); "not to assign or otherwise part with the premises for the whole or any part of the term" (m); "not to let, set, or demise the premises for all or any part of the term" (n). Underletting.

Ves. 186; *Hodgkinson v. Crowe*, L. R. 10 Ch. 622; *Re Lander and Bagley's Contract*, (1892) 3 Ch. 41.

(e) 3 Anstr. 701; cf. *Morgan v. Slaughter*, 1 Esp. 8.

(f) *Church v. Brown*, 15 Ves. 264.

(g) *Hampshire v. Wickens*, 7 Ch. D. 555.

(h) *Re Lander v. Bagley*, (1892) 3 Ch. 41.

(i) *Weatherall v. Geering*, 12 Ves. 504.

(j) *Church v. Brown*, 15 Ves. 265; *ante*, p. 21.

(k) *Crusoe d. Blencowe v. Bagby*, 2 W. Bl. 766; 3 Wils. 234; *Kinnersley v. Orpe*, 1 Doug. 56; *Church v. Brown*, 15 Ves. 265.

(l) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(m) *Doe d. Holland v. Worsley*, 1 Camp. 20.

(n) *Greenaway v. Adams*, 12 Ves. 395.

What is a breach.

Warrant of attorney.

Where a lessee who had entered into a covenant not to let, set, or assign, &c., with a proviso of re-entry, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, it was held that the lease was not thereby forfeited; but that to give a warrant of attorney for the express purpose of having the lease taken in execution thereunder did warrant a forfeiture (o).

In *Croft v. Lumley* (p), the lessee of an opera house, who had covenanted in the lease "not to charge or incumber the theatre or the income thereof, or the term thereby granted, by mortgaging the same or granting any rent-charge or other incumbrance whatever," being in debt gave a warrant of attorney to secure bills not due, as a concurrent security with an indenture therein recited, on which the grantee was to be at liberty to enter up judgment when he thought fit.

The grantee signed judgment against the lessee upon this warrant, and this was, upon the judge's order, registered; but it was held that the covenant was not thereby broken.

"I am of opinion," said Lord Cranworth (q), "as I stated in *Lane v. Horlock* (r), that simply giving a warrant of attorney, if it is *bonâ fide* given to secure a debt which the party might recover by process of law, and in respect of which, if the debtor does not give a warrant of attorney, the creditor will recover adversely, in such a case a warrant of attorney given in order to avoid the expense of law proceedings is not a charge within the meaning of that statute (s); but if a person not having a power of assignment on charging the property gives a warrant of attorney with a view to evade that restriction which is imposed on him, then the circumstances may be such as to make it amount to a charge or incumbrance, or at least to estop

(o) *Doe d. Mitchinson v. Carter*,
8 T. R. 57; *Lane v. Horlock*, 5
H. L. C. 580, p. 599.
(p) 6 H. L. C. 672.

(q) 6 H. L. C. p. 739.

(r) 5 H. L. C. p. 599.

(s) 1 & 2 Vict. c. 110, s. 13.

him from saying it is not a charge or incumbrance to all intents and purposes."

Letting the premises from year to year is a breach of a covenant not to underlease (*t*). Letting premises from year to year.

A covenant not to underlease would seem to prevent an assignment of the whole term (*u*).

Letting lodgings is not breach of a covenant not to underlet (*x*). Letting lodgings.

When A. and B., who were partners, were assignees of a lease which contained a covenant by the lessee for himself and his assigns that he would not—neither should his executors, administrators, or assigns—assign the premises without the written consent of the lessor, and on the dissolution of the partnership A. assigned all his interest in the premises to B., this was held a breach of the covenant (*y*). Partnership—actual assignment.

But where a lease was made to B. and H. as joint tenants, and the lessees covenanted that "they, their executors, administrators, and assigns, or any or either of them, would not during the term assign, underlet or part with the possession of the demised property or any part thereof to any person or persons without the written consent of the lessor, his heirs and assigns, and on the dissolution of the partnership it was agreed that the partnership property should be made over to B., and that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, and it was recited, as the fact was, that H. had given up sole possession to B., but H. executed no assignment and the lessor's consent was not applied for," it was held that there had been no breach of the covenant (*z*). Agreement to assign.

(*t*) *Timms v. Baker*, 49 L. T. Rep. 106. Camp. 77.

(*u*) *Greenaway v. Adams*, 12 Ves. 395; *Barry v. Stanton*, Cro. Eliz. 331. (y) *Varley v. Coppard*, L. R. 7 C. P. 505; cf. *Finch v. Underwood*, 2 Ch. D. 310.

(*z*) *Corporation of Bristol v. Westcott*, 12 Ch. Div. 461.

(*x*) *Doe d. Pitt v. Laming*, 4

And Jessel, M. R., comments on *Varley v. Coppard* (a): "In that case the outgoing partner purported to assign, so the case does not go far enough for your purpose" (i.e., to show that an agreement to assign to one partner on a dissolution is a breach). "I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment, but a release; but you have to rely on the words 'part with the possession,' and how can possession be parted with to a person who already has it?" (b).

A lessor was held entitled to re-enter where the lease contained a proviso for re-entry in case of assignment, without licence, and the lessee agreed to enter into partnership with P., and that he should have the exclusive use of part of the premises, and the use of the rest jointly with the lessee, as being a parting with the exclusive possession of some part of the demised premises (c).

Additional
rent.

Where a tenant was to pay an additional rent if he "suffered any part to be occupied by another person," and allowed other persons to use small portions for raising a potato crop, although to do so was proved to be the custom of the country, the landlord was held entitled to the additional rent (d).

Equitable
mortgage.

The deposit of a lease by way of equitable mortgage of the brewers of the lessee was held no breach of a covenant in a lease not to "let, sell, assign, transfer, set over or otherwise part with the premises hereby demised, or this present indenture of lease" (e).

And where S. deposited a lease, containing a covenant not to assign, with a proviso for re-entry on breach, as a security for money borrowed, and became bankrupt, and

(a) L. R. 7 C. P. 505.

(b) 12 Ch. Div. p. 465.

(c) *Roe d. Dingley v. Sales*, 1 M. & S. 297.

(d) *Greenslade v. Tapscott*, 2 C. M. & R. 55; 4 Tyrw. 566.

(e) *Doe d. Pitt v. Hogg*, 4 D. & R. 225; 1 C. & P. 160; nom. *Doe d. Pitt v. Laming*, R. & M. 36; *Ex p. Drake*, 1 M. D. & De G. 539.

the lease was sold by the direction of the Chancellor to pay that debt, it was held that assignees under the commission might assign the lease to the vendee without the consent of the vendor, for such an assignment under compulsion of law is not an assignment within the meaning of the covenant (*f*).

A restriction on underletting is not broken by advertising that the demised farm is to let (*g*). Advertisement.

It was at one time held that a bequest of a lease was a breach of a covenant or condition not to assign, but that if the executor had the term there was no forfeiture (*h*). But it has also been held that a covenant not to assign was not broken by a bequest (*i*), and this seems to be the better opinion. Bequest.

A covenant not to assign is not broken by a lessee being adjudicated bankrupt upon his own petition under the Bankruptcy Act, 1883 (*k*). It was broken by an assignment by the lessee for the benefit of his creditors under the Bankruptcy Act, 1861 (*l*). Bankruptcy.

A covenant or condition that the lessee, his executors or administrators, shall not assign, is not binding on the assignee of the lessee (*m*). "It cannot run with the land, because the question of its running supposes an assignment, and the very assignment by act of law or by the licence of the lessor destroys the covenant" (*n*). Who are bound—Assignee:

(*f*) *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353, p. 359.

(*g*) *Gourlay v. Duke of Somerset*, 1 V. & B. 68; *Turner v. Richardson*, 7 East, 335.

(*h*) *Windsor v. Burry*, Dyer, 45b, n.; *Parry v. Harbert*, Dyer, 45b; *Knight v. Mory*, Cro. Eliz. 60; *Barry v. Stanton*, Cro. Eliz. 330; *Horton v. Horton*, Cro. Jac. 14; *Burton v. Horton*, 1 Roll. Abr. 428, pl. 1.

(*i*) *Fox v. Swan*, Style, 483, cited 3 Wils. 236; *Doe v. Bevan*,

3 M. & S. 361, per Bayley, J.; in *Doe v. Evans*, 9 A. & E. 719, the Court declined to express an opinion on the point.

(*k*) *Re Riggs*, (1901) 2 K. B. 16; *Ex p. Dawes*, 17 Q. B. D. 275.

(*l*) *Holland v. Cole*, 1 H. & C. 67.

(*m*) *Paul v. Nurse*, 2 M. & R. 525; 8 B. & C. 486; *Doe d. Cheere v. Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, 280; *Bally v. Wells*, 3 Wils. 33.

(*n*) 1 Wms. Saund. 288b (x).

Formerly, a licence to assign or sublet was a total waiver of the condition against assigning or subletting (o). But by the Law of Property Amendment Act, 1859 (p), a licence to assign or sublet extends only to permission actually given.

And now, a covenant not to assign without licence is binding on assignees when named.

In *Williams v. Earle* (q), the lessees covenanted for themselves, their heirs, executors, administrators, and assigns, not to assign or underlet without first obtaining the consent of the lessor. The lease was, under a licence from the lessor, assigned to Earle in 1860, and in 1866 Earle assigned to Banks, an impecunious person. The covenant not to assign without licence was held to run with the land, so that the lessors were entitled to sue Earle.

In *West v. Dobb* (r), *Williams v. Earle* (q) was cited as deciding that a covenant not to assign ran with the land, but Blackburn, J., protested against that case being taken to have decided more than that the covenant ran with the land, and bound the assignee, *assigns being mentioned*, that fact being expressly pointed out in the judgment.

"First, if the covenant or proviso extends to the lessee only, then an assignee, by law, is not within it, and he may assign without incurring a forfeiture (s). Secondly, if it extends to the lessee, his executors and administrators, then all of them are bound by it (t). But with respect to this last rule, as the covenant or proviso does not extend to the lessee, his executors, administrators, and assigns, assignees under a commission in bankruptcy are not bound by it (u). Thirdly, but if the covenant or proviso expressly

(o) *Dumpor's Case*, 4 Rep. 119b.

(p) 22 & 23 Vict. c. 35, s. 1.

(q) L. R. 3 Q. B. 739.

(r) L. R. 4 Q. B. 637.

(s) *Dyer*, 65b, pl. 8; *Cox v. Brown*, 1 Ch. Rep. 170; *Seers v. Hind*, 1 Ves. jun. 295.

(t) *Roe d. Gregson v. Harrison*, 2 T. R. 425; M. 44, pl. 136; cf. *Sir W. More's Case*, Cro. Eliz. 26; *Thornhill v. King*, Cro. Eliz. 757.

(u) *Philpot v. Hoare*, 2 Atk. 219; *Goring v. Warner*, 2 Eq. Ab. 100, pl. 3.

names the lessee and his assigns, then it seems, from the words of Lord Hardwicke in the above case of *Philpot v. Hoare* (x), and from the determination in *Sir William More's Case* (y), that all assignees, by operation of law, are within it" (z).

But a covenant not to assign has been held not to be binding upon a trustee in bankruptcy, as the restriction applies to voluntary, and not involuntary, acts (a). But a lease may be made to determine upon bankruptcy (b). Trustee in bankruptcy :

The joint effect of the Conveyancing and Law of Property Act, 1892 (c), s. 2, sub-s. 2, and the Conveyancing and Law of Property Act, 1881 (d), s. 14, sub-s. 6, is that forfeiture on bankruptcy is excluded for one year from the date of the bankruptcy, and a sufficient notice under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, is a condition precedent to enforcing the forfeiture (e).

Although, since 1859, a covenant not to assign without licence may possibly be held to run with the land, even where assigns are not mentioned, it will be safer to mention them expressly.

If the lessor consents to the underletting of the demised premises, the underlessee is in no way bound by the stipulations restraining assignment in the original lease, for there is no privity between the lessor and the underlessee. Underlessee.

In *Williamson v. Williamson* (f), a lease of mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a licence to sublet a part, but the licence provided that this should not authorize any further

(x) 2 Atk. 219.

(y) Cro. Eliz. 26.

(z) 2 Atk. 220, n.

(a) *Roe v. Galliers*, 2 T. R. 133;
Doe v. Carter, 8 T. R. 57; *Doe v. Bevan*, 3 M. & S. 353; *Ex p. Sherman*, Buck, 462.

(b) *Ex p. Gould*, 13 Q. B. D. 454.

(c) 55 & 56 Vict. c. 13.

(d) 44 & 45 Vict. c. 41.

(e) *Horsey Estate, Limited v. Steiger*, (1899) 2 Q. B. A. 79.

(f) L. R. 9 Ch. 729.

letting or assigning of the part of the mines, the subject of such licence, without such consent as was required by the lease. The lessee then agreed to sublet part of the mines, the subject of the licence, under an agreement that the underlease should contain provisions in all respects like those in the original lease. It was held that the underlease ought to contain a covenant against letting or assigning without the consent of the lessee.

In *Haywood v. Silber* (g), the plaintiff, a lessee of part of the property of a hospital, agreed to grant to the defendant an underlease to contain all usual covenants, including a covenant not to assign or underlet without the consent of the plaintiff, such consent not to be unreasonably withheld if the proposed assigns be respectable and responsible, together with such other covenants, clauses, and provisions as were contained in the lease under which the premises were held. One of the covenants in the plaintiff's lease was not to assign without the consent of the hospital, and it was held that the plaintiff was entitled to have this covenant inserted without modification, so as to bind the underlessee not to assign without the consent of the hospital.

The cases were distinguished on the ground that the agreement in *Williamson v. Williamson* (h) was that the lessee should grant a lease to his underlessee of which the original lease was to be merely a model, while in *Haywood v. Silber* (i) the effect of the words of the agreement was that a lease identical in terms with the original lease should be granted. "The form of agreement in the present case is so different from that in *Williamson v. Williamson* (h), that we can deal with this case on what appears to us the true construction of the contract without feeling ourselves to be in any way acting contrary to the decision in *Williamson v. Williamson* (h), though we arrive at a different result" (k).

(g) 30 Ch. Div. 404. (h) L. R. 9 Ch. 729. (i) 30 Ch. Div. 404.

(k) 30 Ch. Div. p. 411, per Cotton, L. J.

It is the duty of the vendor of a lease containing a proviso against alienation to procure the lessor's licence to the assignment (*l*); but this is not so in case of a sale to a railway company under its compulsory powers. Specific performance was accordingly decreed against a railway company which had taken leasehold premises held under a lease restricting alienation without the lessor's licence, although the lessor's licence had not been obtained by the lessee (*m*).

Consent to assignment should be obtained by vendor,

A lessee who has contracted to underlet, subject to obtaining his landlord's licence, is not bound to take legal proceedings to oblige his landlord to give his consent, even when he has power to do so; but having used all reasonable efforts to induce his landlord to consent, is at liberty to treat the contract as at an end (*n*).

but not bound to take legal proceedings.

A lessee of a public-house had covenanted not to assign without the consent of the lessor, with the usual qualification as to refusal in the case of a respectable and responsible tenant. The lessee contracted to sell to brewers, but the lessor refused to give his consent, stating that he desired the house to remain a free house. It was held that the title was not one that could be forced on an unwilling purchaser (*o*).

Title not forced on an unwilling purchaser.

Where there is a heavy rent reserved, and a covenant not to sublet without consent, "such consent not to be withheld except upon reasonable objection," very strong ground for refusing consent must be shown, as such refusal imposes a heavy burden on the lessee (*p*).

The omission to ask the lessor's consent at all is, however, not a mistake against which the Court can give relief (*q*).

(*l*) *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 7 Taunt. 9; 2 Marsh. 33.

(*m*) *Slipper v. Tottenham and Hampstead Junction Railway Company*, L. R. 4 Eq. 112.

(*n*) *Lehmann v. McArthur*, L. R.

3 Ch. 496.

(*o*) *Re Marshall and Salt's Contract*, (1900) 2 Ch. 202.

(*p*) *Sheppard v. Hongkong and Shanghai Banking Corporation*, 20 W. R. 459.

(*q*) *Post*, p. 126.

Arbitrary
refusal.

Where a lessee covenanted not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld," and there was a proviso for re-entry on such assignment, it was held that the effect of an arbitrary (*i.e.*, an unfair and unreasonable) refusal would be to leave the lessee at liberty to assign without the lessor's consent (*r*), but that there was no covenant express or implied on the part of the lessor not to refuse his consent arbitrarily.

And in *Sear v. House Property and Investment Society* (*s*), it was stated that the effect of an unreasonable refusal to assent to an assignment to a responsible and respectable tenant would be to leave the lessee at liberty to deal with the premises without restriction. Following *Treloar v. Bigge* (*r*), the words "such consent not to be unreasonably withheld" were held to be a qualification of the lessee's covenant, and not to amount to a contract on the part of the lessor.

In *Bates v. Donaldson* (*t*), a lease contained a covenant by the lessee not to assign without licence, "such licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee," and a clause for re-entry on breach of any of the covenants of the lease. The lessor withheld a licence to assign because he desired to obtain possession of the premises. The assignment was then carried out, and the lessor brought an action to recover possession for breach of covenant, but it was held that the licence had been unreasonably withheld, and that the lessor was not entitled to recover.

In *Hyde v. Warden* (*u*), Amphlett, L. J., said that where the stipulation was that consent should not be withheld from an assignment or underlease to a respectable and responsible person, and no imputation had been made

(*r*) *Treloar v. Bigge*, L. R. 9 Ex. 151.

(*s*) 16 Ch. D. 387.

(*t*) (1896) 2 Q. B. A. 241.

(*u*) 3 Ex. Div. 72, p. 81.

against the defendant, an attempt to eject him on the ground of want of consent would fail. "If this judgment is in conflict with the subsequent case of *Barrou v. Isaacs* (v), I certainly agree with the decision in the last-named case. . . . In *Burford v. Unwin* (x), Huddleston, B., expressed a decision adverse to *Hyde v. Warden* (y), by which he was bound" (z).

Where a lease contains a covenant by the lessee not to assign without the licence in writing of the lessor, "such licence not to be unreasonably withheld," although the lessor, in refusing a licence to assign, is not bound to give any reason for his refusal, yet, if in granting a licence he attaches to it a condition which, in the opinion of the Court, is unreasonable, the Court can make a declaratory order that the lessor is not entitled to impose the unreasonable condition, and that the lessee is entitled to assign without any further consent of the lessor (a).

A building lease contained an absolute covenant not to assign without licence. The lessors refused a licence to assign unless the lessee would deposit £2,000 as further security for the performance of the uncompleted part of the building contract. It was held that the lessors might lawfully require such a deposit as a condition for granting the licence (b).

No Relief in Equity.

"It is clearly settled that if an ejectment is brought upon a right of re-entry reserved (upon a covenant not to assign without licence) the lessee can have no relief; he cannot show that by the assignment the lessor sustains no

(v) (1891) 1 Q. B. A. 417.

(x) 1 Cab. & E. 494.

(y) 3 Ex. Div. 72, p. 81.

(z) *Eastern Telegraph Company*

v. Dent, (1899) 1 Q. B. A. 835,
p. 838, per Smith, M. R.

(a) *Young v. Ashley Gardens*
Properties, Limited, (1903) 2 Ch. A.
112.

(b) *Re Cosh's Contract*, (1897) 1
Ch. A. 9.

damage, that on the contrary, he, the lessee, is a beggar, who could not pay the rent, and the assignee is a solvent tenant; that the lessor is, therefore, in a better condition, having two persons answerable to him instead of one tenant, under the circumstances I have mentioned. The answer is that the Court cannot estimate the damage; the fact, as it is alleged, may be true at the moment, but the consideration whether the lessor is to gain or lose by having a tenant put upon him must run through the whole continuance of the lease; it is sufficient that the lessor insists upon his covenant, and no one has a right to put him in a different situation. The distinction has been taken that relief may be had against the breach of a covenant to pay money against a given day, but not where anything else is to be done" (c).

No relief is given under the Conveyancing and Law of Property Act, 1881, in cases of forfeiture for breach of a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased (d).

But by the Conveyancing and Law of Property Act, 1892 (e), s. 4, relief may be given to an underlessee (*post*, p. 144).

Covenants
against
assignment
not relieved
against.

In *Barrow v. Isaacs* (f), there was a covenant not to underlet the premises or any part thereof without the consent in writing of the lessor, which consent the lessor agreed should not be arbitrarily withheld in the case of a respectable and responsible person, and power to re-enter was given in case the lessees did not well and truly observe and perform their covenants. The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared without looking

(c) *Hill v. Barclay*, 18 Ves. 56, p. 63, per Lord Eldon; cf. *Wafer v. Mocatto*, 9 Mod. 112; *Reynolds v. Pitt*, 19 Ves. 142; *Lovat v. Lord Ranelagh*, 3 Ves. & B. 24; *Wadman v. Calcraft*, 10 Ves. 67.

(d) 44 & 45 Vict. c. 41, s. 14 (6) (i).

(e) 55 & 56 Vict. c. 13.

(f) (1891) 1 Q. B. A. 417; followed *Eastern Telegraph Company v. Dent*, (1899) 1 Q. B. A. 835.

at the head-lease. The lessees and under-lessees were respectable and responsible persons, to whom no objection could be taken. It was held that the omission to ask the lessor's consent was not a mistake in respect of which equitable relief against forfeiture for breach of covenant could be granted, and that the lessor was entitled to succeed in an action to recover possession of the premises for breach of the covenant.

A proviso for re-entry on breach of any of the covenants contained in a lease applies to breach of a covenant not to assign or underlet the premises without the consent of the lessor (g).

Where there is a right of re-entry given for assigning Evidence. or underletting, if a person is found on the premises appearing as the tenant, it was, in one case, held *prima facie* evidence of an underletting sufficient to call upon the lessee to show in what character such person was in possession (h).

But in ejectment on a clause of re-entry in breach of a covenant "not to assign, set over or otherwise let the demised premises," proof that a stranger was in possession, who said that they were demised to him by another stranger, was insufficient, and would have been insufficient even though the lessee had covenanted not to part with the premises (i).

In 1860, A. demised premises to T. and P. for fourteen years, and the lessees covenanted not to underlet, assign or otherwise part with the possession of the premises without the written consent of the lessor, with a proviso for re-entry on breach of covenants. In 1865, A., by a letter, consented to a transfer of the lease to Wade, who entered into possession, although no formal assignment was executed. In 1867, A. wrote, in answer to Wade, "I have no

(g) *Harman v. Ainslie*, (1904) 1
K. B. A. 698.

(h) *Doe d. Huntley v. Rickarby*,
5 Esp. 4.

(i) *Doe v. Payne*, 1 Stark. 36.

objection to the trustees, C. and H., acting for Wade in respect of the premises, to vest the same in their hands, similar to the transfer I allowed Wade from T. and P." Wade assigned to the trustees, who entered, and subsequently parted with the possession without A.'s consent, but it was held that there had been no breach of the covenant (*k*).

Measure of
damages.

The measure of damages for breach of a covenant not to assign without licence is such a sum as will, as far as money can, put the lessors in the same position as if they still had the assignor's liability instead of the liability of another of inferior pecuniary ability for breaches both past and future (*l*).

Where a lessee, in breach of his covenant not to sublet without the written consent of his lessor, sublet the premises to a turpentine distiller, and the house was burnt down, it was held that the loss caused by the fire could be recovered from the lessee as damages for the breach of covenant (*m*).

(*k*) *West v. Dobb*, L. R. 5 Q. B. Q. B. 739.

460.

(*m*) *Lepa v. Rogers*, (1893) 1

(*l*) *Williams v. Earle*, L. R. 3 Q. B. 31.

CHAPTER VII.

WAIVER AND RELIEF GIVEN BY CONVEYANCING AND LAW
OF PROPERTY ACTS, 1881 AND 1892.

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BEFORE 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, there was a distinction between leases for lives and for years; for it was a rule that where an estate commenced by livery it could not be determined before entry (*a*). A lease for life, therefore, was only voidable on breach of the condition by the lessor's re-entry, even though the clause expressed that the lease should cease and be void (*b*). Where there
can be
waiver.
Leases for
lives.

And, in a lease for years, where there is a condition that for non-payment of rent, or the like, the lease shall be “null and void,” it has still been held that the lease is only voidable at the option of the lessor (*c*). Leases for
years.

(*a*) *Browning v. Boston*, Plowd. 135; *Pennant's Case*, 3 Rep. 65b.

(*b*) 1 Wms. Saund. 287d, n.

(*c*) *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; *Jones v. Carter*, 15 M. & W.

Formerly, however, it was held that, in such a case, where the lessee was guilty of any breach of the conditions of re-entry, the lease was absolutely void, and could not be set up again by acceptance of rent due after the breach of the conditions or by any other act (*d*).

"Perhaps the true rule may be ultimately held to be that the effect of the proviso rendering the lease void is only to dispense with *entry*, and to substitute for it any formal expression of the lessor's election to avoid the lease (*e*).

Extent of
waiver.

A lessor who has a right of re-entry on breach of a covenant—*e.g.*, not to underlet—does not, by waiving his right of re-entry on one underletting, lose his right to re-enter on a subsequent underletting (*f*); but previously to 22 & 23 Vict. c. 35, s. 3, if an assignment was waived, a condition determining the lease in case of assignment was gone as much as if a licence had been granted (*g*).

Distrain.

Where a lessor distrained with knowledge of breach of covenant not to underlet, he was held to have waived the breach, and it was held that the lessee's permitting the underlessee to remain in occupation during the remainder of the year was not a new or continuing breach of a covenant "not to permit any other person to occupy" without consent (*h*).

Acceptance of
rent due
since for-
feiture.

And in *Griffin v. Tomkins* (*i*), certain premises were held under a lease in which the lessees covenanted "not to

718; *Roberts v. Davey*, 4 B. & Ad. 664; *Davenport v. The Queen*, 3 App. Ca. 115; *Arnsby v. Woodward*, 6 B. & C. 519.

(*d*) Co. Lit. 215a; *Simpson v. Butcher*, Doug. 51; *Pennant's Case*, 3 Rep. 64b; *Goodright v. Davids*, Cowp. 80b; 1 Wms. Saund. 287d, n.

(*e*) *Dumpor's Case*, 1 Smith's L. C. p. 57n (9th ed.), citing *Bowser v. Colby*, 1 Hare, 109. But in the 10th ed. p. 43, it is

stated that the distinction between leases which are void and leases which are voidable upon breach of condition has no practical effect.

(*f*) *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

(*g*) *Lloyd v. Crispe*, 5 Taunt. 249; *Dumpor's Case*, Cro. Eliz. 815.

(*h*) *Walrond v. Hawkins*, L. R. 10 C. P. 342.

(*i*) 42 L. T. Rep. 359.

permit or suffer at any time during the term to be used, exercised, or carried on upon the said premises, or any part thereof, any art, trade, profession, or business whatsoever without the licence or consent of the lessor first obtained."

There was a power of re-entry on breach of covenant. The lessees, after making certain alterations by consent, allowed two plumbers to carry on business on part of the premises in a shop suited for such business, and paid two quarters' rent, which was received by the lessor with knowledge of the use of the premises by the plumbers. The lessor, who had given no written licence, brought an action to recover the land for forfeiture for continuing breach of covenant, but was held to have waived the forfeiture.

Bringing an action for rent accruing subsequently to the breach of covenant amounts to a waiver of the breach unless there is a recurring breach.

Action for recovery of rent accrued since breach.

In *Dendy v. Nicholl* (k), the defendant was tenant to the plaintiff under a lease which contained a covenant by the lessee not to underlet the premises without the consent in writing of the lessor. The defendant broke this covenant by letting to one Frend in 1854. On the 30th April, 1857, the plaintiff commenced an action against the defendant to recover the arrears of rent due from Michaelmas, 1854, to Lady Day, 1857. "For the defendant it was said that, though he had incurred a forfeiture by underletting without the lessor's consent, yet the plaintiff had waived his right to take advantage of the forfeiture by having, with knowledge of its existence, brought an action for rent subsequently accruing under which the rent up to the 25th March, 1857, was paid on the 23rd May. On the other hand, it is said, as the action for ejectment was brought on the 16th May, 1857, the very day on which the judge's order was made in the action commenced on the 30th April, and before the money was paid in that

(k) 4 C. B. N. S. 376.

action the plaintiff's right of entry was not waived, and he was entitled on that day to insist on the forfeiture. The question, therefore, is whether the bringing the action for rent on the 30th April, and subsequent acceptance of rent in that action, amounted to a waiver. I am of opinion that it did. . . . The act relied on (in *Jones v. Carter* (l)) as determining the landlord's option was bringing an ejectment. How does that apply here? Here the landlord, by bringing an action for rent accruing subsequent to the accrual of the forfeiture, and obtaining payment of rent by means of that action, has clearly made the election to treat the lessee as his tenant" (m).

Secus, where there is a recurring breach.

In *Penton v. Barnett* (n), a lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair, the lessor gave notice in writing to the lessee requiring him to execute the repairs specified in the schedule thereto within three months. On 23rd December, 1896 (three days after the expiration of the notice), a quarter's rent became due. No repairs had been done, and the lessor, on 14th January, 1896, issued a writ to recover possession, and also claimed a quarter's rent. It was held that the breach of covenant being a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of non-repair after the date when the rent fell due.

"All that was laid down in *Dendy v. Nicholl* (m) was that an action for rent was as good as a waiver of forfeiture, as an action of ejectment was as a determination of the tenancy. If there had not been a recurring breach, but something which had happened once for all, the state of things might have been different" (o).

(l) 15 M. & W. 718.

(n) (1898) 1 Q. B. A. 276.

(m) 4 C. B. N. S. p. 383, per Crowder, J.

(o) *Ib.* p. 281, per Rigby, L. J.

Acceptance of rent which accrued due before the forfeiture is no waiver. Acceptance of rent due at forfeiture.

Thus in *Greene's Case* (p), "Greene made a lease for years rendering rent with a clause of re-entry, and the rent due at the Feast of the Annunciation was behind, which rent the lessor afterwards accepted, and afterwards entered for the condition broken, and his entry was holden lawful, for the rent was due before the condition broken. But if the lessor accepts the *next* quarter's rent, then he hath lost the benefit of the entry, for thereby he admits the lessee to be his tenant; and if the lessor *distrain* for rent due at the said Feast of the Annunciation after the forfeiture, he cannot afterwards re-enter for the said forfeiture, for by his distress he hath affirmed the possession of the lessee. So if he make an *acquittance of the rent as rent*, contrary if the acquittance be but for a sum of money, and not expressly for rent, all which *tota curia concessit*."

Acceptance of money tendered as rent accrued since the forfeiture, even if the lessor takes it as something else, *e.g.*, compensation for past occupation, would seem to amount to waiver of all breaches of covenant known at the time. Acceptance of money paid as rent.

"The party paying the money had, in my judgment, a clear right to appropriate it. He distinctly paid the money as rent. He refused to pay it otherwise than as rent. M. (the lessor's agent) refused in language to receive it as rent, but he did take it. What he did, not what he said, was, in my humble opinion, the all important matter. He should have declined to take the money at all if he meant to elect to proceed for the forfeiture" (q).

"Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally, and

(p) 1 Leon. 262. But in Cro. Eliz. 3, Greene is said to be the lessee, and that his lessor gave him a receipt by the name of his fermor, which was held a full declaration

of his intention to continue him his tenant, so that the lessor's subsequent entry was not lawful.

(q) Croft v. Lumley, 6 H. L. C. p. 694, per Channell, B.

without prejudice to the right to insist upon a prior forfeiture, cannot countervail the effect of such receipt" (r).

In *Strong v. Stringer* (s), a tenant was in possession of plots of land, under an agreement for leases to be granted when he should have fulfilled certain conditions as to building houses within a specified time. The tenant did not complete within the time appointed, but after the time had expired the landlord applied for rent. He gave a receipt, stating that the rent was received "without prejudice to any breaches of covenant made up to this time in the agreement for leases." The tenant completed the houses, but the landlord refused to grant the leases. It was held that the demand for rent recognized the position of the tenant, and that it was too late for the landlord to introduce into his receipt any clause negating that recognition.

No waiver
after entry.

When once ejectment is brought there can be no waiver of the right of re-entry, for the lessor thereby finally elects to treat the lease as forfeited, and he cannot afterwards sue for rent due or covenants broken (t).

Thus, in *Grimwood v. Moss* (u), a lease contained a condition of re-entry for breach of covenant. On the 21st June, 1871, the lessors brought ejectment for breaches of covenant, and did not claim the premises as from any previous day, and in September, 1871, distrained for rent due to the 24th June, 1871, but it was held that they had not by such distress precluded themselves from relying on breaches prior to the 24th June, 1871, having unequivocally declared their intention, and that the subsequent distress, if not justifiable under 8 Anne, c. 11 (allowing the landlord, under certain circumstances, to distrain after the determination of the tenancy), was a trespass.

(r) *Davenport v. The Queen*, 3 718; *Doe v. Meux*, 1 C. & P. 346; App. Ca. p. 132. *Bridges v. Smyth*, 5 Bing. 410.

(s) 61 L. T. Rep. 470.

(t) *Jones v. Carter*, 15 M. & W. (u) L. R. 7 C. P. 360.

"The act of entry is one of those acts *in pais* mentioned in the judgment in the case of *Lyon v. Reed* (x), which binds parties by way of estoppel, as being acts of notoriety not less formal and solemn than the execution of a deed. . . . The whole case comes to this: there is an action, the bringing of which is equivalent to an entry for the forfeiture which determines the term, followed by a distress, which is either a trespass, for which the defendant has his remedy, or if valid, does not involve any continuance of the term, but is so by reason of a statute which entitles the landlord to distress after the term is determined" (y).

The benefit of a restrictive covenant may be waived by acquiescence. Acqui-
escence.

In *Gibson v. Doeg* (z), the lessee, in 1828, covenanted with the lessor not to carry on any trade on the demised premises, but that they should be used as villas and gardens. In 1835, part of the premises was turned into a public-house, and another part into a shop for the sale of flour, and no objection was made by the person then entitled to the reversion. The plaintiff purchased the reversion in 1856, and brought ejectment for breach of covenant, but it was held that a licence in writing from the reversioner for what the lessee had done must be presumed.

A delay of fourteen months in taking proceedings to restrain breach of a restrictive covenant is not such waiver as will disentitle the plaintiff to an injunction (a).

Waiver of a minor breach does not disentitle a covenantee to recover for a more serious breach (b).

In *Sayers v. Collyer* (c), a building estate was laid out in lots, and sold to different purchasers, each of whom covenanted with the vendors and the purchasers of the

(x) 13 M. & W. 309.

(y) L. R. 7 C. P. pp. 364, 365,
per Willes, J.

(z) 2 H. & N. 615.

(a) *Duke of Northumberland v. Bowman*, 56 L. T. Rep. 773.

(b) *Meredith v. Wilson*, 69 L. T. Rep. 336.

(c) 28 Ch. Div. 105.

other lots not to build a shop on his land, or to use his house as a shop, or to carry on any trade there. The purchaser of one lot brought an action against the purchaser of another lot, who was using his house as a beer-shop with an off-licence, to restrain him from breaking his covenant, and for damages. The plaintiff had known of the breach for three years, and had himself bought beer from the defendant, and it was held that by his acquiescence in the breach he had lost his right to enforce the covenant.

Where a covenantee has acquiesced in deviation by some tenants from a plan, according to which buildings were covenanted to be erected, he may not be entitled to an injunction to restrain other tenants from infringing the covenant (*d*).

Where land was conveyed, in 1874, subject to a covenant that no dwelling-house, shop or other building to be erected on the land should at any time thereafter be used as a tavern or public-house, and shortly after the conveyance beer and spirits were sold at one of the houses, and the sale of beer and spirits was conducted openly for upwards of twenty-four years, it was held that waiver or release of the covenant must be presumed, and that the existence of the restrictive covenant did not furnish a ground for the rescission of a contract for the sale of the house (*e*).

Acquiescence in the erection of a stable with a warehouse over it, and allowing a board to be put up by a house agent in the window of a house, was held not to disentitle a covenantee from suing to prevent two houses from being converted into shops (*f*).

A purchaser can enforce stipulations in a building scheme, subject to which he purchases, although his conveyance contains a departure therefrom, as the other pur-

(*d*) *Roper v. Williams, T. & R.* 1 Ch. 108; cf. *Re Summerson, ib.* 18. p. 112, n.

(*e*) *Hepworth v. Pickles, (1900)* (*f*) *Osborne v. Bradley, (1903)* 2 Ch. 446.

chasers are not bound by it. And a sub-purchaser of part of a lot can enforce the stipulations although, previously to his purchase, his vendor had committed a breach on another part (*g*).

The purchaser of a lot subject to a restrictive covenant may be entitled to enforce the covenant although he himself has committed a slight breach of the covenant.

A building estate was sold in lots, subject to a covenant that no building on any lot should be used as a shop, workshop, warehouse or factory, nor should any trade or manufacture be carried on upon any lot. W. had carried on the business of laundryman on a lot since 1886. In 1893 he began to build a building suitable for his business. The plaintiff, who was the owner of other lots, had kept cows on them, and sold the milk, but discontinued so doing in 1886. He had also let part of his lots to a mason, who had erected a shed thereon, and used it for the purposes of his business. It was held that the defendant had committed a breach of the covenant greater and more serious than any previously committed, and that, having regard to that fact, the plaintiff was entitled to an injunction (*h*).

An estate was put up for sale by auction in 1852 under conditions which provided that each purchaser should covenant that no trade or business should be carried on upon the lots purchased by them. The plaintiff bought from a purchaser of one of these lots. The defendant erected a large laundry, with the intention of carrying on the business of a laundryman on other lots purchased with notice of the scheme. There had been trivial breaches of the scheme, but no acquiescence on the part of residents, and it was held that the plaintiff was entitled to an injunction (*i*).

(*g*) *Rowell v. Satchell*, (1903) 2 Rep. 336.
 Ch. 212. (*i*) *Knight v. Simmonds*, (1896)
 (*h*) *Meredith v. Wilson*, 69 L. T. 2 Ch. A. 294.

Relief under
Conveyancing
and Law of
Property Act,
1881.

By sect. 14 of the Conveyancing and Law of Property Act, 1881 :—

“(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee failing within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

“(2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as the Court, having regard to the proceedings and conduct of the parties under the foregoing provision of this section and to all the other circumstances, think fit, and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future as the Court in the circumstances of each case may think fit.

“3. For the purposes of this section a lease includes an original or derivative underlease, also a grant at a fee-farm rent or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

“(4) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

“(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

“(6) This section does not extend—

“(i) To a covenant or condition against the assigning, underletting, parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee’s interest; or

“(ii) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mine or the workings thereof.

“(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

“(9) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.”

The notice to be served on a lessee by a lessor to entitle the lessor to enforce a right of re-entry for the breach must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. A notice that the covenants for repairing the inside and

Notices under sect. 16, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881.

outside of premises had been broken was held to be insufficient (*k*).

A notice may be good though it does not require payment of compensation in money (*l*). The cases to the contrary (*m*) have been disapproved of by the Court of Appeal.

Under this section the tenant may apply for relief until the landlord has re-entered (*n*); but after the landlord has actually re-entered he cannot obtain relief (*o*).

But where a landlord had not given a notice complying with the requisitions of sect. 14, sub-sect. 1, relief was granted to the equitable mortgagee of a lessee after the landlord had recovered possession (*p*).

Compensa-
tion.

The compensation for breach of covenant which a lessee is liable to pay under sect. 14 of the Conveyancing and Law of Property Act, 1881, did not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by that section (*q*).

But the Court has power to make the payment of costs as between solicitor and client, and of the expenses of surveys and schedules of dilapidations, a condition of staying an action to recover possession (*r*).

By sect. 2 (1) of the Conveyancing and Law of Property Act, 1892, "a lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving

(*k*) *Fletcher v. Nokes*, (1897) 1 Div. 672, p. 677, per Bowen, L. J. Ch. 271. (*o*) *Rogers v. Rice*, (1892) 2 Ch. A. 170.

(*l*) *Lock v. Pearce*, (1893) 2 Ch. A. 271. (*p*) *North London Land Company v. Jaques*, 32 W. R. 283.

(*m*) *North London Land Company v. Jaques*, 32 W. R. 283; *Greenfield v. Hanson*, 2 Times Rep. 876. (*q*) *Skinnars' Company v. Knight*, (1891) 2 Q. B. A. 542.

(*n*) *Quilter v. Mapelson*, 9 Q. B. 876. (*r*) *Bridge v. Quick*, 67 L. T. Rep. 54.

rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

As between himself and the original lessor, an under-lessee is not a "lessee" within the meaning of this section.

In 1884, eleven houses were demised by the plaintiff's predecessor in title for long terms to various lessees whose interests became vested in Henry Hall, who in the same year mortgaged to the defendants. In 1892 the plaintiff discovered that the premises were out of repair, and employed a surveyor to inspect them, and to prepare a schedule of the works necessary to remedy the breaches of covenant. He also employed a solicitor to prepare the notices under sect. 14 (1) of the Conveyancing and Law of Property Act, 1881. The defendants complied with the notices, and put the premises in repair. The plaintiff then sued for the costs and expenses incurred in the employment of the surveyor and solicitor, but was held not to be entitled to recover (s).

By the Conveyancing and Law of Property Act, 1892 (t), s. 2 (2), "sub-sect. 6 of sect. 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within one year, but in case the lessee's interest be sold within such one year, sub-sect. 6 shall cease to be applicable thereto."

"(3) Sub-sect. 2 of this section is not to apply to any lease of—(a) Agricultural or pastoral land; (b) mines or minerals; (c) a house used or intended to be used as a

(s) *Nind v. Nineteenth Century Building Society*, (1894) 2 Q. B. A. 226.

(t) 55 & 56 Vict. c. 13.

public-house or beershop; (d) a house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; (e) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him."

A lease of premises to an individual and a joint-stock company contained a covenant by the lessees to repair, and a proviso for re-entry for breach of covenant, or if the lessees should become bankrupt or enter into liquidation for the benefit of or compound with creditors, or, being a company, should enter into liquidation, whether voluntary or compulsory. The company passed a resolution to wind up with a view to reconstruction. The assignees of the reversion gave notice alleging forfeiture, and two days after service of the notice, and within a year of the resolution to wind up, commenced an action for recovery of the premises. It was held that the company had entered into liquidation within the meaning of the condition, but that a sufficient notice under sect. 14, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881 (*u*), was a condition precedent to enforcing the forfeiture, the effect of sect. 2, sub-sect. 2, of the Conveyancing and Law of Property Act, 1892 (*v*), being to take the case of forfeiture on bankruptcy or liquidation out of sub-sect. 6 of sect. 14 of the Conveyancing and Law of Property Act, 1881, for a year from the date of the bankruptcy or liquidation, and that the notice given was not sufficient (*x*).

In *Re Riggs, Ex p. Lovell* (*y*), the lessee of premises covenanted not to assign or underlet the premises without the consent of the lessor; the lease also contained a proviso for forfeiture if the lessee should become bankrupt, or should

(*u*) 44 & 45 Vict. c. 41.

(*v*) 55 & 56 Vict. c. 13.

(*x*) *Horsely Estate, Limited v. Steiger*, (1899) 2 Q. B. A. 79.

(*y*) (1901) 2 K. B. 16.

file a petition in bankruptcy, and the usual proviso for re-entry upon the breach of any covenant contained in the lease. The lessee was adjudicated a bankrupt upon his own petition. The lessor thereupon re-entered, without giving a notice which complied with the Conveyancing and Law of Property Act, 1881, s. 14 (1). The trustee in bankruptcy claimed possession. It was held that, under the Conveyancing and Law of Property Act, 1881, s. 14, sub-ss. (1) and (6), as amended by the Conveyancing and Law of Property Act, 1892, s. 2, a notice complying with the requirements of the earlier Act was a necessary condition precedent to re-entry, and that the adjudication on the lessee's own petition was not a breach of the covenant not to assign.

Sect. 14 of the Conveyancing and Law of Property Act, 1881, was held not to enable relief to be given where there was an agreement for a lease, and there had been breach of a covenant which it was stipulated was to be inserted in the lease (z). Agreement for a lease.

But since the Judicature Act, where there is a valid agreement a tenant holds under the same terms, and has the same rights and liabilities as if a lease had been granted (a).

The Conveyancing and Law of Property Act, 1892 (b), s. 5, however, now provides:—

“In sect. 14 of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, ‘lease’ shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and ‘underlease’ shall also include an agreement for an underlease where the under-lessee has become entitled

(z) *Coatsworth v. Johnson*, 55 L. J. Q. B. 220; 54 L. T. Rep. 520.

(a) *Walsh v. Lonsdale*, 21 Ch. Div. 9; approved by Cotton, L. J., in *Lowther v. Heaver*, 41 Ch. Div.

at p. 266; and explained by Lord Esher in *Swain v. Ayres*, 21 Q. B. Div. pp. 292, 293; cf. *Manchester Brewery Company v. Coombs*, 82 L. T. Rep. 347, p. 351.

(b) 55 & 56 Vict. c. 13.

to have his underlease granted, and in this Act under-lessee shall include any person deriving title under or from an under-lessee."

Under-lessee. The provisions of sect. 14 of the Conveyancing and Law of Property Act, 1881, did not enable an under-lessee of a part of the demised premises to obtain relief for breach of a covenant to repair contained in the head-lease (*c*).

The Conveyancing and Law of Property Act, 1892 (*d*), now provides (sect. 4): "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof, in any person entitled as under-lessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit; but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

The Court has jurisdiction under the Conveyancing and Law of Property Act, 1892, to relieve an under-lessee against a forfeiture of the original lease, though such forfeiture was occasioned by breach of a covenant not to assign or underlet without licence. But this jurisdiction will be exercised with caution, and the under-lessee asking for its exercise must show that he is blameless, and has

(*c*) *Burt v. Gray*, (1891) 2 Q. B. Rep. 811.
98; *Creswell v. Davidson*, 56 L. T. (*d*) 55 & 56 Vict. c. 13.

taken all precautions which a reasonably cautious man would use.

In *Imray v. Oakshette* (d), L. purchased an underlease for £60 under a contract which did not give him the right to call for the title of the original lessee, who was bound not to assign or underlet without licence, and entered into possession and spent £500. The landlords commenced proceedings to recover possession of the whole property. L. applied for relief, but it was held that he had been guilty of negligence in entering into such a contract, that he was precluded from properly investigating the title, and ought not to be relieved.

In *Wardens of Cholmley School, Highgate v. Sewell* (e), the plaintiffs, in 1878, granted a lease for fifty years to Jonathan Jones at a rent of £720, with a proviso for re-entry on the bankruptcy of the lessee, his executors, administrators or assigns, or any of them. The lease had now been assigned to Sewell, who had covenanted with the plaintiffs for the payment of rent and the performance of the covenants and conditions in the lease. In September, 1890, Sewell mortgaged the premises to Messrs. Nicholson, who went into possession on the 31st May, 1892. On the 19th July, 1892, Sewell was adjudicated bankrupt. The plaintiffs brought this action to recover possession of the premises, and on the 5th June, 1893, Sewell's trustee in bankruptcy disclaimed all interest in the lease. Messrs. Nicholson asked for relief against the forfeiture by Sewell, and for an order vesting in them the property comprised in the lease for the whole unexpired residue of the term of fifty years except the last day. It was held that there was jurisdiction to give relief, and there being a covenant not to assign without licence, an order was made vesting the premises in Messrs. Nicholson for the whole of their term upon payment of all rent due and upon their

(d) (1897) 2 Q. B. A. 218.

(e) (1894) 2 Q. B. 906.

executing a deed containing the same covenants with reference to the premises as Sewell was under, and upon their paying the plaintiffs' costs.

In *Gray v. Bonsall* (*f*), the assignee of a lease had incurred a forfeiture for non-payment of rent, and the under-lessees applied for relief. It was held that there was jurisdiction under sect. 4 of the Conveyancing Act, 1892, to give relief.

(*f*) (1904) 1 K. B. A. 601.

CHAPTER VIII.

WHO ARE LIABLE UNDER, AND TO WHOM THE BENEFIT
OF A COVENANT EXTENDS, AND JOINT, SEVERAL,
AND JOINT AND SEVERAL COVENANTS.

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If a man covenants for himself, his heirs, &c., and under his own hand and seal for the act of another (as that he shall pay the purchase-money of an estate), he will be personally bound, though he describe himself in the deed as covenanting for and on behalf of another; for there is nothing unusual or inconsistent in the nature of things that one should covenant to another that a third party should do a certain thing (a).

Where directors of a mining company agreed by deed to purchase a mine of the plaintiffs, the purchase-money to

(a) *Appleton v. Binks*, 5 East, 148.

be paid within twelve months by instalments "out of moneys to be raised by the company," with a proviso that in case they should not have received the deposits from the shareholders so as to pay by the time stipulated for, the directors should be allowed a further six months, and the directors covenanted "out of the said payments so to be made by the subscribers or shareholders" to pay the purchase-money according to the times before specified, subject to the above proviso, it was held that this was a personal undertaking by the directors to pay at the expiration of the additional six months (b).

Lessee liable on express covenants, though he assigns.

A lessee remains liable upon his express covenants, notwithstanding assignment of the term. "For if the lessee assign over his term, and the lessee accept of the assignee as his tenant, now the lessor cannot have an action of debt for the rent against the first lessee by reason of his own acceptance. . . . But yet in such a case the lessor, after his own acceptance, shall maintain an action of covenant, as is adjudged in *Bachelour and Gage's Case*" (c).

Bankruptcy.

A covenantor remained liable upon an express covenant after his discharge under the Insolvent Act of 16 Geo. 3, c. 38 (d), and bankruptcy was no bar to an action for rent accrued after bankruptcy (e). But under 49 Geo. 3, c. 121, s. 19, an entire end to the bankrupt's covenants was put where the lease was accepted by the assignees. And now by the Bankruptcy Act, 1883 (f), s. 54 (2), the property of the bankrupt vests in the trustee on his appointment, and a power of disclaiming onerous property is given by sect. 55. If this power is not exercised within the time appointed, the trustee becomes personally liable on the

(b) *Hancock v. Hudson*, 12 Moo. 564; nom. *Hancock v. Hodgson*, 4 Bing. 269.

(c) Cro. Car. 188; *Thursby v. Plant*, 1 Wms. Saund. 240a; *Brett v. Cumberland*, Cro. Jac. 521.

(d) *Cotterel v. Hooke*, 1 Doug. 97; *Marks v. Upton*, 7 T. R. 305.

(e) *Mills v. Auriol*, 1 H. Bl. 433; 4 T. R. 94.

(f) 46 & 47 Vict. c. 52.

covenants in the lease (*g*), and the effect of disclaimer is to determine the rights, interests, and liabilities of the bankrupt and his property in respect of the property disclaimed, and to discharge the trustee from all personal liability as from the date on which the property vested in him, and the bankrupt, on obtaining his discharge, is freed from liability under a covenant, except in case of fraud or breach of trust (*h*).

Where the lessee becomes bankrupt, and the trustee dis-claims the lease, a surety who guaranteed the payment of rent is discharged as from the date of the disclaimer (*i*). Surety.

Where the trustee in the bankruptcy of a lessee has disclaimed a lease which the bankrupt had mortgaged by sub-demise, the original lessor is entitled to apply for an order vesting the property in the mortgagee, subject to the same liabilities and obligations as the bankrupt was subject to under the original lease (*k*). Disclaimer.

Whether, assuming a vesting order is made in the mortgagee, he becomes liable as assignee, or to the same extent as if he was the original lessee, remained undecided (*l*).

By the Bankruptcy Act, 1890 (*m*), s. 13, the period of twelve months is substituted for each of the periods of three months and two months limited by sub-sect. 1 of sect. 55 of the Bankruptcy Act, 1883, and it is provided that "the Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-sect. 6 of the same section, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order." 53 & 54 Vict. c. 71.

(*g*) *Ex p. Dressler*, 9 Ch. Div. 252; *Titterton v. Cooper*, 9 Q. B. Div. 473.

(*h*) 46 & 47 Vict. c. 52, s. 30.

(*i*) *Stacey v. Hill*, (1901) 1 Q. B. A. 660.

(*k*) *Re Finley*, 21 Q. B. Div. 475.

(*l*) *Ib.* p. 487, per Lindley, L. J.

(*m*) 53 & 54 Vict. c. 71.

In *Re Walker* (n), Williams, J., held that vesting orders will, as a rule, be given so that the person in whose favour they are made will be subject to the onus of all unperformed obligations, whether past or future, to which the bankrupt was liable when the petition was filed.

In *Re Baker* (o), S. granted a lease to C. for twenty-one years. On C.'s death it was assigned to D., and afterwards to B., who mortgaged by sub-demise to L., and gave a second mortgage to N. B. became bankrupt, and his trustee in bankruptcy disclaimed the lease. The original lessor sought for a vesting order in the mortgagees, and it was held that although there was no evidence to negative the solvency of the original lessee, the second mortgagee must accept a vesting order or be excluded; in default of acceptance a similar election must be given to the first mortgagee.

In *Hardy v. Fothergill* (p), the assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants to repair and yield up in repair at the end of the term. Eight years before the expiration of the lease, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869 (q), and obtained an order of discharge. After the term expired, the lessors recovered damages against the lessees upon the covenants to repair and yield up in repair, and the lessees claimed an indemnity from the assignee. It was held that their claim was barred under sect. 49 of the Bankruptcy Act, 1869 (q), by the order of discharge, the effect of sect. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of Court declared it to be a liability incapable of being fairly estimated.

Liability under a covenant for the payment by the cove-

(n) 72 L. T. Rep. 330.

(o) (1901) 2 K. B. A. 628.

(p) 13 App. Cas. 351.

(q) 32 & 33 Vict. c. 71.

nantor out of his estate after his death is provable as a debt on the bankruptcy of the covenantor under sect. 37 of the Bankruptcy Act, 1883 (*r*), and if such proof is not made, the right of action is barred by the bankruptcy (*s*).

A composition scheme, approved under sect. 18, subsect. 8, of the Bankruptcy Act, 1883 (*r*), includes all debts and liabilities that would be released by an order of discharge in bankruptcy (*t*).

Though covenant lies against a lessee on his covenant for payment of rent, it does not on a covenant implied from the use of the words "yielding and paying" after he has assigned (*u*). Implied covenants discharged by assignment,

In *Hellier v. Casbard* (*x*), it was held that the words "yielding and paying" amounted to an express covenant, but the better opinion seems to be that the covenant is only implied (*y*).

Where a covenant for quiet enjoyment is implied by the use of the word "demise," it is limited to the duration of the lessor's interest (*z*). or by expiration of lessor's interest.

Anyone that is a party to the deed to whom the covenant is made may take advantage of the covenant, but not a stranger; for if A. covenant with B. to do an act to C., who is no party to the deed, and A. doth it not, B., and not C., must sue him for the breach (*a*). Who can sue.

A mere stranger to the consideration cannot enforce performance of the contract, even though he is avowedly intended to be benefited thereby (*b*).

(*r*) 46 & 47 Vict. c. 52.

(*s*) *Barnett v. King*, (1891) 1 Ch. A. 4.

(*t*) *Flint v. Barnard*, 22 Q. B. Div. 90.

(*u*) 1 Sid. 447; *Mills v. Auriol*, 4 T. R. 98; *Bachelour and Gage's Case*, Cro. Car. 188.

(*x*) 1 Sid. 266; cf. *Roll. Abr. tit. Cov. C. pl. 10*; 1 Wms. Saund. 241n (2).

(*y*) *Iggulden v. May*, 9 Ves. 330;

Church v. Brown, 15 Ves. 550; *Anon.* 1 Sid. 447, pl. 9.

(*z*) *Baynes & Company v. Lloyd & Sons*, (1895) 2 Q. B. A. 610, ante, p. 12.

(*a*) *Shep. Touch.* 175; cf. *Southampton v. Brown*, 6 B. & C. 718; *Ex p. Richardson*, 14 Ves. 187; *Colyear v. Mulgrave*, 2 Keen, 81.

(*b*) *Tweddle v. Atkinson*, 1 B. & S. 393, 398.

A covenantee who is a party to an indenture can sue a covenantor who has executed, though he has not himself executed, and there are cross-covenants on his part forming the consideration of the covenantor's covenant (*c*).

A covenant entered into with any person named in a deed poll is valid (*d*).

Since 1845 the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture (*e*).

And since the Judicature Act, 1873 (*f*), the benefit of a covenant can be assigned.

Marriage settlements.

Children of a marriage are entitled to enforce covenants in an ante-nuptial marriage settlement (*g*). But they are not entitled to enforce covenants in a voluntary settlement (*h*).

In *Gale v. Gale* (*i*), a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage was made in pursuance of an agreement made between her and her second husband, and enforced at the suit of those children.

But the principle of *Newstead v. Searles* (*k*), whereby limitations contained in the marriage settlement of a widow in favour of her children by a former marriage are not treated as voluntary, will not be extended to the like limitations in the marriage settlement of a widower (*l*).

In *Newstead v. Searles* (*k*), "the limitations in favour of the children of the former marriage and the children of the second marriage were so complicated and mixed up, and they were so much dealt with together as a class,

(*c*) *Morgan v. Pike*, 14 C. B. Div. 1.
473.

(*d*) *Green v. Hoare*, 1 Salk. 197, Div. 95, p. 105.
ante, p. 6.

(*e*) 8 & 9 Vict. c. 106, s. 5.

(*f*) 36 & 37 Vict. c. 66, s. 25 (6).

(*g*) *Tucker v. Bennett*, 38 Ch.

(*h*) *Green v. Paterson*, 32 Ch.

(*i*) 6 Ch. D. 144.

(*k*) 1 Atk. 265; West, Ch. 287.

(*l*) *Re Cameron and Wells*, 37 Ch. D. 32.

that it was impossible to give effect to the limitations in favour of the one without giving effect to the limitations in favour of the other" (m).

A limitation in a marriage settlement in favour of the settlor's illegitimate child and his issue is not within the marriage consideration (n).

The general rule of law is that the Courts will not enforce a marriage settlement in favour of stranger volunteers, who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But where the persons who are within the consideration of the marriage take only on terms which admit in participation with them others who would not be within the consideration, the consideration of the mutual contract extends to and includes them (o).

"In *Gale v. Gale* (p), Fry, J., as he then was, held that the children of a lady by her first marriage who were volunteers, and he treats them so, could nevertheless enforce a covenant contained in that marriage settlement against persons claiming under the will of the settlor. He in effect said: 'Although you are volunteers, yet, having regard to the decision in *Newstead v. Searles* (q), you are volunteers of an exceptional kind, you are volunteers in favour of whom the Court will execute an imperfect gift.' Whether he went too far in that respect I do not know. I must say I feel great difficulty in following him, and he certainly went far beyond *Newstead v. Searles* (q), which only decided that such persons taking under the settlement then in question . . . were not to be overridden under the statute 27 Eliz. by a subsequent conveyance to a purchaser" (r).

(m) *Attorney-General v. Jacobs Smith*, (1895) 2 Q. B. A. 340, p. 351, per Lopes, L. J.

(n) *De Mestre v. West*, (1891) A. C. 264.

(o) *Mackie v. Herbertson*, 9 App. Cas. 303.

(p) 6 Ch. D. 144.

(q) 1 Atk. 265.

(r) (1895) 2 Q. B. A. p. 349, per Lindley, L. J.

Covenant
entered into
for benefit
of another.

Where a covenant is entered into with one person for the benefit of another, then, if the covenantee will not sue, the person beneficially interested may sue in equity (s).

In *Touche v. Metropolitan Railway Warehousing Company* (t), there was an arrangement between a promoter of a company and another person that a certain sum should be paid out of the funds of the company to that other person. In the articles there was a stipulation that the money should be paid to the promoter, in order that the arrangement might be carried out. It was held that the person who was to get the money was entitled to sue under the contract. It may be that, on the facts of the case, it was considered that the contract between the promoter and the company was entered into by the promoter as trustee for the plaintiff (u).

In *Re Empress Engineering Company* (x), A. and B. agreed with C., on behalf of a company intended to be formed, that A. and B. should sell, and the company purchase, a certain business, and it was a term of the agreement that sixty guineas should be paid certain solicitors for their expenses and charges in registering the company. The memorandum of association adopted this agreement, which was subsequently ratified by the directors. The solicitors claimed to prove in the winding-up for the sixty guineas, but it was held that a contract between A. and B. and the company, to which the solicitors were not parties—that the company should pay money to the solicitors—would not entitle the solicitors to proceed against the company.

Separation
deed.

By a deed of separation between husband and wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife and two eldest daughters, and also to pay to the trustees all the expenses of the main-

(s) *Gandy v. Gandy*, 30 Ch. Div. 57, p. 74, per Cotton, L. J.

(t) L. R. 6 Ch. 671.

(u) See *Gandy v. Gandy*, 30 Ch. Div. 57, p. 67, per Cotton, L. J.

(x) 16 Ch. Div. 125.

tenance and education of the two youngest daughters, subject to certain conditions. On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, and she brought an action by her next friend against the husband and the trustees of the separation deed, to enforce the husband's covenant, the trustees having refused to allow their names to be used as plaintiffs. It was held that the plaintiff was not in the position of a *cestui que trust* under the covenant, so as to entitle her to maintain the action, but leave to amend was given. The trustees still refused to sue, and the wife was made a co-plaintiff. It was held that the trustees were to be considered trustees for the wife, and that if they refused to sue, she could sue in equity (*y*).

Covenants for title run with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him (*z*). Covenants running with land.

When the benefit of a restrictive covenant has been once clearly annexed to a piece of land, there is a presumption that it passes by an assignment of that piece of land, and it may be said to run with the land in equity as well as at law (*z*).

A reversioner must show special damage to entitle him to succeed in an action upon a restrictive covenant (*a*), although, if in possession, he would be entitled to have the covenant strictly performed.

"If restrictive covenants are entered into with a cove- Restrictive covenant.
nantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to

(*y*) *Gandy v. Gandy*, 30 Ch. Div. Ch. A. 388, p. 396, per Farwell, J.;
57. cf. p. 59.

(*z*) *Rogers v. Hosegood*, (1900) 2 (*a*) *Johnston v. Hall*, 4 W. R.
407.

me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position, with power again for them to assign, and so on indefinitely. Clearly at law such a right or power to assign does not exist, and in equity up to the present time no such right has been recognized" (b).

Liability of
executors and
adminis-
trators.

In every case where the testator is bound by a covenant the executor shall be bound by it, except where it was to be performed by the person of the testator, or is determined by his death (c).

"The executors of every person are implied in himself, and bound without naming" (d).

But if tenant for life make a lease for years reserving rent by indenture, and dies during the term, and the remainderman enter on the termor, an action will not lie against the executor, except upon an express covenant (e).

If a man covenants that A. shall serve B. as an apprentice for seven years, and dies, if A. departs in the term, a writ of covenant lies against the executors of the covenantor, though unnamed (f).

If a man be bound to instruct an apprentice in a trade for seven years, and dies, the condition is dispensed with; but if he is likewise bound to find him in meat, clothes, &c., the executor must do this, though he cannot instruct him (g).

"If an obligation be *obligo me*, &c., this is a good obligation, and the executors and administrators, though not the heir, are bound by it" (h).

"The general rule is that the executor of a lessee is liable as assignee except that, with respect to rent, his

(b) *Formby v. Barker*, (1903) 2 Ch. A. 539, p. 554, per Romer, L.J.

(c) *Bac. Abr. Cov. E.* (1); *Bally v. Wells*, 3 Wils. 29.

(d) *Hyde v. Skinner*, 2 P. Wms. 197, per Lord Maclesfield.

(e) *Swan v. Strausham*, 3 Dy. 297a, *ante*, p. 11.

(f) 1 *Bac. Abr. Cov. E.* (1).

(g) *Ib.*; *Wadsworth v. Gye*, 1 Sid. 216.

(h) *Shep. Touch.* 369.

liability does not exceed what the property yields. No such exception applies to the covenant for repairs" (i).

Where the residue of a term of years becomes vested in executors, the yearly value of which is less than the rent reserved, the executors are personally liable for so much as the premises are worth (k).

If executors do not assign a lease of which the rent is greater than the yearly value, they may be liable to exonerate the testator's estate (l).

It is not usual for trustees, in a mortgage deed, to enter into a covenant to pay the money advanced (m).

If a testator has entered into an agreement to take a lease, his executors will be bound to accept a lease so qualified that they are no further liable than they would have been on the covenants which would have been entered into by the testator, in case a proper lease had been made to him (n).

In *Raymond v. Fitch* (o), a lessee covenanted with the testator not to fell, stub up, lop or top timber-trees excepted out of the demise, and committed a breach in the testator's lifetime. It was held that the executor was entitled to sue.

An executor cannot sue for a breach of a covenant restricting the user of land committed after the testator's death where the testator has sold the whole of his land (p).

"It has been a sort of maxim in the law that an executor so far represents his testator as to be entitled to maintain an action in respect of all personal contracts made with the testator and broken in his lifetime; but from Co. Lit. (q),

Personal
representa-
tives suing.

(i) *Tremeere v. Morrison*, 1 Bing. N. C. 89, per Bosanquet, J., p. 99.

(k) *Rubery v. Stevens*, 4 B. & Ad. 241.

(l) *Rowley v. Adams*, 4 My. & Cr. 534.

(m) *Stroughill v. Anstey*, 1 De G. M. & G. 636, p. 642.

(n) *Phillips v. Everard*, 5 Sim. 102; cf. *Stephens v. Hotham*, 1 K. & J. 571.

(o) 2 C. M. & R. 588.

(p) *Formby v. Barker*, (1903) 2 Ch. A. 539.

(q) Co. Lit. 162a.

and other authorities cited (*r*), it should seem that, in contracts relating to the freehold, the executor does not represent his testator quite to that extent" (*s*).

"It is laid down generally in Comyn's Digest (*t*) that if A. covenant with B. upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the lifetime of the testator. But, as is remarked by Lord Ellenborough, C. J. (*s*), the authority cited in support of this position (*u*) will be found not to bear it out in its generality. For in that case there was an eviction in the lifetime of the testator; and therefore the damages in respect of such eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor, and nothing descended to the heir. But in cases where there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title (as it was in *Kingdon v. Nottle* (*s*)), and the like, the executor can have no action, because, if he recovered at all, he must recover the full amount of the damages for such defect of title, and such recovery would bar the heir, who could not afterwards maintain another action upon the same breach. That an action upon this covenant will lie at the suit of the devisee of the original covenantee, see *Kingdon v. Nottle* (*x*), and by the heir, *King v. Jones* (*y*) (*z*).

Though not named, an executor can sue on a covenant relating to a chattel (*a*), and covenants relating to land not of inheritance, or not devolving on the heir as special occupant, are now deemed to be made with the covenantee, his executors, administrators, and assigns (*b*).

(*r*) *Lougher v. Williams*, 2 Lev. 92; *F. N. B.* 145c; *Shep. Touch.* 171; *Bac. Abr. Cov. E.*; *Wooton v. Cooke*, And. 53.

(*s*) *Kingdon v. Nottle*, 1 M. & S. 355, p. 362, per Lord Ellenborough.

(*t*) Comyn's Digest, tit. Cov. B. 1.

(*u*) *Lucy v. Levington*, 2 Lev. 26; 1 Vent. 175.

(*x*) 4 M. & S. 53.

(*y*) 1 Marsh. 107; 4 M. & S. 188.

(*z*) 2 Wms. Saund. 181b (c).

(*a*) *Doe d. Rogers v. Rogers*, 2 N. & M. 550; *Shep. Touch.* 175; *Fitz. N. B.* 145c.

(*b*) 44 & 45 Vict. c. 41, s. 58 (2), *post*, p. 190.

By the common law freehold lands of inheritance which descended on the heir were assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heir was named (*c*). Heirs and devisees.

But the devisee was not responsible for the payment of the testator's debts at law (*d*), or in equity (*e*). And if the heir-at-law had aliened before action brought, there was no remedy against him at law, though in equity he was responsible for the value of the land aliened (*f*).

To remedy this, 3 & 4 Will. & M. c. 14 (made perpetual by 6 & 7 Will. 3, c. 14, and extended to Ireland by 4 Anne, c. 5), was passed, but was repealed and substantially re-enacted and extended to covenants by 11 Geo. 4 & 1 Will. 4, c. 47.

"The statute of Will. & M. extends to cases of devisees not only where the devisor is seised in fee, but where he has the power to dispose of the subject-matter of the devise, which in terms includes every beneficial interest he may possess, and the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor by the 3rd section of the Act" (*g*).

Conveyance to new trustees is not such an alienation as will, under sect. 7 of 3 Will. & M. c. 14, prevent an action against the trustees of the will and the heir; nor is a mortgage by the equitable tenant for life, "For under the statute the liability attaches upon the land, and not upon the person, except in cases of alienation; and therefore, although the trustees are not liable to the debts of the devisor, yet the creditors may, through them, make the land available for the satisfaction of their debt. Upon a

(*c*) *Plaskett v. Beeby*, 4 East, 485, p. 491; *Buckley v. Nightingale*, 1 Str. 655.

(*d*) 4 East, 491; *Wilson v. Knubley*, 7 East, 135, per Grose, J.; cf. *Carlisle v. Blamire*, 8 East, 487.

(*e*) *Galton v. Hancock*, 2 Atk.

432.

(*f*) *Coleman v. Winch*, 1 P. Wms. 776, p. 777, per Lord Maclesfield.

(*g*) *Coope v. Creswell*, L. R. 2 Ch. 112, p. 121, per Lord Chelmsford.

judgment obtained against the trustees, execution would, of course, extend to the whole estate. But if any beneficial interest in it had been *bonâ fide* aliened before action brought, I think this Court would, upon application being made to it, prevent the interest so aliened from being affected by the execution" (h).

By 11 Geo. 4 & 1 Will. 4, c. 17, s. 2:—

"And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened that where several persons having, by bonds, covenants, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted that all wills and testamentary limitations, dispositions, or appointments already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them with whom the person or persons making any such

(h) *Coope v. Creswell*, L. R. 2 Ch. 112, p. 122, per Lord Chelmsford; cf. *British Mutual Investment Company v. Smart*, L. R. 10 Ch. 567.

wills, testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs), to be fraudulent, and clearly, absolutely, and utterly void and frustrate and of none effect, any pretence, colour, feigned or presumed consideration or any other matter or thing to the contrary notwithstanding."

Leasehold estates *pur autre vie* are included in the words, "whereof any person shall be seised in fee, or have power to dispose of" (i), and so are equitable interests (k).

Sect. 3. "And for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted that in the case before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee or devisees, or the devisee or devisees of such first mentioned devisee or devisees jointly by virtue of this Act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, or for not confessing the lands or tenements to him descended."

Sect. 6. "That in all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors, in respect of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon

(i) *Westfaling v. Westfaling*, 3
Atk. 460, 466.

(k) *Coope v. Creswell*, L. R. 2
Ch. 112.

any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments *bonâ fide* aliened before action brought shall not be liable to such execution."

"By taking proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated" (l).

By sect. 7, the heir may plead *riens per descent* to such an action.

By sect. 8, devisees made liable shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before action brought.

By 32 & 33 Vict. c. 46, s. 1, the priority of specialty creditors was taken from them.

By the Conveyancing and Law of Property Act, 1881 (m), s. 59—

"(1) A covenant and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate of the person making the same, as if heirs were expressed.

"(2) This section extends to a covenant implied by virtue of this Act.

"(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and shall have effect subject to the

(l) *Richardson v. Horton*, 11 *M. R.*
Beav. 112, p. 123, per Lord Langdale, M. R. (m) 44 & 45 Vict. c. 41.

terms of the covenant, contract, bond or obligation, and to the provisions therein contained.

“(4) This section applies only to a covenant, contract, bond or obligation made or implied after the commencement of this Act.”

The effect of this section is to enable specialty creditors, where the heir is not named, to sue the heirs and devisees directly, unless there is some provision to the contrary in the deed under which they claim; the section facilitating the remedy, but not enlarging the rights of the specialty creditor by bond or covenant (n).

The heir, where the covenant relates to the inheritance, and is such as runs with the land, though the covenant be with the lessor, his executors and administrators, without naming the heir, shall have an action of covenant for breach (o). When benefit extends to heir.

See Conveyancing and Law of Property Act, 1881 (oo), s. 58 (p).

An assignee of a lease (though only by way of mortgage) becomes liable for the covenant for payment of rent, although he has never actually occupied, or become possessed (q). Liability of assignee.

But an assignee can rid himself of all future liability by assigning over. Thus, in *Lekeux v. Nash* (r), an assignee of a lease assigned over to a poor woman then in prison in the Fleet, in consideration of 5s., which it appeared he had lent her for that purpose, and thereby freed himself from liability. Terminates on assignment.

“As at law an assignee of a term may assign, and thereby

(n) Hood and Challis, Conveyancing Act (2nd ed.), pp. 107, 108.

(o) Lougher v. Williams, 2 Lev. 92; Shep. Touch. 175n. As to what covenants run with the land, see Chap. IX., *post*, p. 180.

(oo) 44 & 45 Vict. c. 41.

(p) *Post*, p. 189.

(q) Williams v. Bosanquet, 1

Brod. & B. 238; 3 Moore, 500; Walker v. Reeves, 2 Doug. 261n; Burton v. Barclay, 5 M. & P. 785.

(r) 2 Stra. 1220; cf. Taylor v. Shum, 1 Brod. & B. 21; Odell v. Wake, 3 Camp. 394; Onalov v. Corrie, 2 Mad. 330; Hopkinson v. Lovering, 11 Q. B. D. 92; Chancellor v. Poole, 1 Doug. 764.

get rid of his subsequent rent, and the covenants that run with the land, *a fortiori* he may do it in equity" (s).

But not as to
past breaches.

But notwithstanding such assignment, the assignee remains liable for breaches of covenants that occurred while he remained assignee (t).

Not liable for
breach prior
to assign-
ment.

An assignee is not liable for breaches of covenant incurred before the assignment to him. A lessee covenanted for himself and his assigns to rebuild and finish a house within such a time, and, after the expiration of the time, assigned over. The assignee was held not liable (u).

Since the Judicature Act (x) the benefit of a covenant can be assigned. Where the benefit of a covenant passes independently of assignment to the assignee of land is discussed in the following chapter (y).

The equitable assignee of a lease who has omitted to perfect his title by a legal assignment, although in possession of the premises, and paying the rent reserved by the lease, is not entitled to the benefit of a covenant giving an option to purchase to the lessee, his executors, administrators and assigns (z).

By a lease in 1880 the "White Lion," Aldershot, was demised by Stone to Master for the term of twenty-one years from the 25th December, 1876, and Stone covenanted with Master that if Master, his executors, administrators and assigns, should at any time during the continuance of the said term be desirous of purchasing the freehold of the said premises at the price of £450, and of such his or their intention should give six calendar months' notice in writing to Stone, his heirs or assigns, Stone, his heirs or assigns, would convey the freehold at the expense of

(s) *Valliant v. Dodemede*, 2 Atk. 546; cf. *Cox v. Bishop*, 8 De G. M. & G. 815.

(t) *Harley v. King*, 5 Tyrw. 692.

(u) *Grescott v. Green*, 1 Salk. 197; cf. *Churchwardens of St. Saviour's, Southwark v. Smith*, 3 Burr. 1271.

(x) 36 & 37 Vict. c. 66, s. 25 (6).

(y) *Post*, p. 180.

(z) *Friary, Holroyd and Healey's Breweries, Limited v. Singleton*, (1899) 1 Ch. 86; reversed on facts, (1899) 2 Ch. A. 261; but cf. *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608.

Master, his heirs and assigns, upon payment of £450. And Master covenanted to accept Stone's title.

The lease subsequently vested in the Friary, Holroyd and Healey's Breweries, Limited, which went into voluntary liquidation in June, 1895, with a view to reconstruction.

By an agreement, dated the 25th June, 1895, and made between the old company of the one part and the plaintiff company of the other part, the old company agreed to sell, and the new company agreed to buy, all the assets of the old company. The new company took possession of the "White Lion" in accordance with this arrangement, and paid the rent reserved by the lease.

On the 14th December, 1896, the new company wrote, asking if the purchase might be completed at once.

No assignment of the lease was made to the new company. The final return to the Registrar of Joint Stock Companies in the winding-up of the old company was made on the 5th August, 1897, so under sect. 143 of the Companies Act, 1862, the old company was "deemed to be dissolved" on the expiration of three months from that date.

"At the time the letter was written, and up to the commencement of this action, they" (the new company) "were not the legal assignees of the lease, but only the equitable assignees of the legal owners. They were not, therefore, in my opinion, the persons entitled under the lease, as against the lessor, to give the notice, and the lessor did not become bound under the lease on receipt of that letter to sell or assure the freehold to the plaintiffs. The word 'assigns' in the option to purchase in the lease given to the lessee, his executors, administrators or assigns, had, in my opinion, the same meaning as the word 'assigns' added to the lessee's name in the covenants entered into by and with him in the lease. In other words, it meant the persons entitled to the term as between them and the lessor, and bound by and entitled to the benefit of the covenants entered into by the lessee and

lessor respectively which ran with the land demised. The plaintiffs, though in possession, could not have been sued at law by the lessor on the lessee's covenants, nor could the plaintiffs have sued the lessor's assigns on his covenants in the lease. Nor would the lessor or his assigns have any right in equity to sue the plaintiffs on the lessee's covenants by reason of the plaintiffs being equitable assigns of the lessee's term and in possession (a) In my judgment, therefore, no valid notice under the lease was given" (b).

Joint covenants.

In a *joint* covenant each covenantor becomes answerable for himself, and also for the due performance of the covenant by another.

A covenant with two "and every of them" is joint, though the two are several parties to the deed (c).

When a covenant is joint, all the covenantees ought to join in an action of covenant (d). "Joint covenantees who may sue must sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to show" (e).

Where one of two covenantees has no beneficial interest, the action must be joint. Thus, in *Anderson v. Martindale* (f), Mackreth, "for himself, his heirs, executors, &c., and the defendant as his surety, &c., did and each of them did jointly and severally covenant to and with A., his executors, administrators, and assigns, and also to and with E. W. and her assigns," to pay an annuity of £60 to A., his executors, administrators, or assigns, during the life of E. W. It was held that this was a joint covenant to A. and E. W., in which they had a joint legal interest,

(a) *Cox v. Bishop*, 2 De G. & Sm. 304; *Moore v. Grey*, 2 De G. & Sm. 304; 2 Ph. 717.

(b) *Friary, Holroyd and Healey's Breweries, Limited v. Singleton*, (1899) 1 Ch. 86, p. 90, per Romer, J.

(c) *Southcoate v. Hoare*, 3 Taunt.

87.

(d) *Yate v. Roules*, 1 Buls. 25, p. 26; cf. *Spencer v. Durant*, Comb. 116; 1 Show. 8; *Saunders v. Johnstone*, Skin. 401.

(e) *Petrie v. Bury*, 3 B. & C. 353.

(f) 1 East, 497.

although the benefit was for A. alone, and on A.'s death the right of action survived to E. W., so that A.'s administrators could not sue on the covenant.

Lord Kenyon, C. J., said : "There is no distinguishing *Slingsby's Case* from the present," and after quoting the report of that case proceeded : "So here I should say here is a covenant to two to pay an annuity to one of them ; shall both bring actions for the same interest where only one duty is to be paid ? Which of them ought to recover for the non-performance of the covenant ? The defendant is only bound to pay the annuity once. This is different from the case put by Lord Coke, where the covenant is to several for the performance of several duties to each ; there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends" (g).

In *Hopkinson v. Lee* (h), there was an agreement under seal made between L. and the defendants of the one part, and the plaintiff and H. of the other part, which recited an application to the defendant to lend money belonging to H., by which the defendants, in consideration of the advance, covenanted with the plaintiff and as a separate and distinct covenant with H., to pay to the plaintiff interest on the part of the money remaining unpaid. It was held, following *Anderson v. Martindale* (i), that the plaintiff without H. could not sue on the covenant.

"In that case it seems to have been understood at one time by this Court [Exchequer] that there were joint words. There are certainly none ; but the nature of the interest in that particular case may possibly justify that decision" (k).

"In that case there was in truth only one joint interest to be protected. It was the money of one which the other had advanced" (l).

(g) 1 East, pp. 500, 501.

(h) 6 Q. B. 964.

(i) 1 East, 497.

(k) *Keightley v. Watson*, 3 Exch.

716, p. 722, per Pollock, C. B.

(l) *Ib.* p. 724, per Parke, B.

In *Foley v. Addenbrooke* (*m*), A. and B. demised premises to the defendant, who covenanted with A. and B., their heirs, executors, &c., to repair. A. died, and his heir brought an action for breaches of covenant since A.'s death. It was held that B. should have joined, although the interest of the covenantees might be separate as between themselves.

Where tenants in common demised according to their several estates, and the lessee covenanted with them and their respective heirs and assigns to repair, &c., it was held that the benefit of the covenant was joint, and not several (*n*).

In *Wakefield v. Brown* (*o*), B., owner of a term, granted S. an annuity, and, to secure such annuity, assigned the term less one day to R., who, at the request of B. and S., leased the premises for a less period to O., who entered into covenants with S. and R. and with B. After S.'s death it was held B. and R. might join in an action for breach of the covenant.

By the Conveyancing and Law of Property Act, 1881 (*p*), s. 60—

“(1) A covenant and a contract under seal, and a bond or obligation under seal, made with two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, shall be deemed to include, and shall by virtue of this Act imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

“(2) This section extends to a covenant implied by virtue of this Act.

“(3) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract,

(*m*) 4 Q. B. 197.

(*n*) *Thompson v. Hakewill*, 19

C. B. N. S. 713.

(*o*) 9 Q. B. 209.

(*p*) 44 & 45 Vict. c. 41.

bond or obligation, and shall have effect subject to the covenant, bond or obligation and to the provisions therein contained.

“(4) This section applies only to a covenant, contract, bond or obligation made or implied after the commencement of this Act.”

The effect of this section with sects. 58 and 59 is “that every covenant may now be made in the simple form: ‘A. hereby covenants with B. that,’ &c., or ‘A. hereby covenants with B. and C. that,’ &c., except covenants relating to land the burden of which is intended to run with the land; and in such covenants A. should covenant for himself and his assigns” (g).

One of two or more covenantors, whatever his interest on the subject-matter may be, can bind himself by a joint *and* several covenant, and the covenantee can sue whichever of the covenantors he elects, although the interest of the covenantors in the subject-matter may be joint, and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a usual thing (r). Covenant may be joint and several on part of covenantor,

A covenant will not be construed as joint and several unless distinctly expressed so to be in the deed itself (s).

A joint and several covenant has been created by the use of the words “covenant for themselves and each of them” (t), “for ourselves and each of us,” or “for ourselves and every of us” (u).

In *Northumberland v. Errington* (x), there were a number of lessees’ covenants in a lease of coal mines which were joint and several. The lessors’ covenants followed, and

(g) Wolstenholme (8th ed.), p. 118.

(r) 1 Wms. Saund. 154, n. (1); *Enys v. Donnithorne*, 2 Burr. 1190; *Lilley v. Hedges*, 1 Stra. 553; 8 Mod. 166; cf. *Collins v. Prosser*, 1 B. & C. 682.

(s) *Sumner v. Powell*, 2 Mer. 30, p. 37; T. & R. 423.

(t) *Robinson v. Walker*, 7 Mod. 154; 1 Salk. 393.

(u) *Bolton v. Lee*, 2 Lev. 56; *May v. Woodward*, 1 Freem. 248.

(x) 5 T. R. 522.

then there was a covenant that moneys due should be accounted for by the lessees, their executors, &c., the words "and each of them" being omitted. It was nevertheless held that this, as well as the former lessees' covenants, was both joint and several.

In *Levy v. Sale* (y), two joint tenants covenanted in a lease for themselves, their heirs, executors, administrators and assigns, that they or some or one of them would pay rent and also would repair at his and their own expense. The covenant was held to be joint only, Mr. Justice Lush saying, "The authorities I find are uniform in holding that where there was no antecedent separate liability, but the obligation exists only by virtue of a joint covenant, the extent of its operation is measured by the words used, and the construction was the same in law and in equity. Whether the covenant in *Tippins v. Coates* (z) would have borne at law the construction put on it by the late Master of the Rolls it is unnecessary to consider. The word 'respectively' which was relied upon in that case is not found in the covenant."

In *Tippins v. Coates* (z), three obligors by bond bound themselves jointly and their heirs respectively to pay a sum of money, and the bond was conditioned to be void if they or either of them, their or either of their heirs paid, and the obligation was held to be joint and several.

Where separate liability existed before a covenant was entered into, a covenant, although joint in form, may be construed as being also several (a); but "where the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived" (b).

In *Clarke v. Bickers* (c), premises were demised to co-partners, A. and B., upon which the partnership business

(y) 37 L. T. Rep. 709.

(z) 18 Beav. 401.

(a) *Beresford v. Browning*, L. R. 20 Eq. 564; 1 Ch. Div. 30.

(b) *Sumner v. Powell*, 2 Mer. 30, per Sir W. Grant, p. 36.

(c) 14 Sim. 639.

was carried on. A. died during the lease, and his executors carried on business on the premises in partnership with B. The covenants in the lease, which were joint, were held not to be considered as several also, so as to make A.'s estate liable for breaches after his death.

In that case "the Vice-Chancellor Shadwell held the covenant of two pawnbrokers contained in a lease to them was a joint covenant. He said that the lessors, although they leased to the pawnbrokers, although they described them as partners, chose to take a joint covenant, and not a joint and several covenant. He did not seem to consider it a partnership contract. Whether that was so or was not, I do not know, but the decision was that it was not" (d).

"A covenant cannot be made by any words, however strong, joint and several on the part of the covenantees in respect of one and the same subject-matter, so as to entitle them to sue *both* jointly and severally. The same covenant cannot be treated as joint or several at the option of the covenantees: they must be entitled jointly only, or severally only" (e).

Where an owner of land was entitled to the benefit of a covenant running with the land, and devised his land to six co-tenants, the case was treated as if there was a separate covenant with each of the co-tenants, so that each of them could sue separately to enforce the covenant made with the testator (f). "They are not seised '*per mie et per tout*,' but each has one undivided sixth part, and the covenant becomes equivalent to six separate covenants on which separate actions can be brought" (g).

In *Slingsby's Case* (h), an action of covenant was brought by Slingsby and his wife on a covenant for title contained in an indenture made between the covenantor, of the first

(d) L. R. 20 Eq. p. 577, per Jessel, M. R.

(e) Leake on Contracts, 455.

(f) *Roberts v. Holland*, (1893) 1 Q. B. 665.

(g) *Ib.* p. 667, per Wills, J.

(h) 5 Rep. 18 b.

part, William Vavasor, Francis Slingsby, and Elizabeth Beckwith, of the second part, and George Harvey and Frances, his wife (at the time of the action the wife of Slingsby), of the third part. The covenant was “ad et cum dictis Will. et Francisco, et ad et cum praed’ Georgio et Francisca uxore ejus, et assignat’ suis *et ad et cum quolibet et qualibet eorum.*” Judgment was obtained, and damages were assessed. A writ of error was then brought in the Exchequer Chamber, when it was held that such judgment was erroneous, “it appearing by the plaintiffs’ own showing in the declaration that the plaintiffs could not maintain an action of covenant, but the other covenantees ought to have joined in the action with them, notwithstanding the words *ad et cum quolibet et qualibet eorum.* For as to these words this difference was agreed: when it appears by the declaration that every of the covenantees hath, or is to have, a several interest or estate, then, when the covenant is made with the covenantees *et cum quolibet eorum*, these words make the covenant several in respect of their several interests. As if a man by indenture demises to A. black acre, to B. white acre, to C. green acre, and covenants with them and *quolibet eorum* that he is lawful owner of all the said acres, &c., in that case, in respect of the said several interests, by the said words *et cum quolibet eorum* the covenant is made several; but if he demises to them the acres jointly, then these words *cum quolibet eorum* are void, for a man by his covenant (unless in respect of several interests) cannot make it first joint and then make it several by the same or the like words *cum quolibet eorum*: for although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them to make it joint or several at the election of several persons for one and the same cause; for the Court would be in doubt for which of them to give judgment. Also the covenantor would be divers times charged for one and the same thing:

and therefore the words *et cum quolibet eorum* are in such case but words of amplification and abundance."

In *Eccleston v. Chipsham* (i), a covenant was in terms joint and several, but the interest and cause of action of the covenantees being joint, it was held that all the covenantees should join in the action.

"The general rule, as laid down in *Eccleston v. Chipsham* and the notes thereto, is that though a covenant may be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees. That rule, no doubt, is subject to the exception that, though a covenant is in terms with several jointly, yet if the beneficial interest of each is several, and there is no interest to any two, one may sue in respect of the breach" (k).

"Sir V. Gibbs assumed (l) that covenants must necessarily be joint or several according to the interest. The language was, 'Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint, and where the interest is joint the action must be joint, although the covenant in language purports to be joint and several.' With great deference, however, the correct rule is that, by express words clearly indicative of the intention, a covenant may be joint or joint and several to or with the covenantors or covenantees, notwithstanding the interests are several (m). So they may be several although the interests are joint. But the implication or construction of law where the words are ambiguous, or are left to the interpretation of the law, will be that the words have an import corresponding with the interest, so as to be joint when the interest is joint, and several when the interest is several" (n).

(i) 1 Wms. Saund. 153.

(m) *Robinson v. Walker*, 1 Salk.

(k) *Pugh v. Stringfield*, 3 C. B.

393; 2 Rol. Abr. 149.

N. S. 2.

(l) *James v. Emery*, 5 Price, 533.

(n) *Shep. Touch.* 166 (Preston).

"It may be fit to observe that a part of Mr. Preston's explanation that by express words a covenant may be joint and several with the covenantors or covenantees, notwithstanding the interests are several, is inaccurately expressed. It is true only of the covenantors" (o).

In *Sorsbie v. Park* (p), Baron Parke said: "The rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing on the face of the deed, if the words are capable of that construction: not that it will be construed to be several by reason of several interests if it be expressly joint. Suppose there were a covenant with A. and B. jointly that a certain thing should be done by the covenantor: both of those persons must sue. But where it appears upon the face of the deed that A. and B. have several interests, they must sue separately."

And in *Keightley v. Watson* (q), Baron Parke observed: "The rule was correctly laid down by Lord Chief Justice Gibbs in the case of *James v. Emery* (r), as taken with the qualification annexed to it by Mr. Preston, which is to be found in his edition of the 'Touchstone.' That qualification was adopted by Lord Abinger and myself in the case of *Sorsbie v. Park* (s). The rule that covenants are to be construed according to the interest of the parties is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as would prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties

(o) *Bradburn v. Botfield*, 14 M. & W. 573, per Parke, B.
(p) 12 M. & W. 146, p. 158.

(q) 3 Exch. 716.
(r) 5 Price, 533.
(s) 12 M. & W. 156.

which they intended to protect, and construe the words according to that interest."

"Where there are separate interests, though many covenantees, there the covenants are several unless the words unequivocally show the meaning to be that the covenants should be joint" (t).

In *Palmer v. Mallet* (u), Mallet became an assistant to Hall and Palmer, surgeons, at N., and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of surgeon" in N., or within ten miles thereof. The condition of the bond was that Mallet "shall not at any time hereafter, directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons, carry on the profession or business of a surgeon" in N., or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., and Hall engaged Mallet as his assistant at a salary. Palmer brought his action to restrain Mallet from acting as such, and it was held that, as the agreement recited in the bond was for the protection of the business carried on by Hall and Palmer, and they had in the business a joint interest during the partnership and several interests in the event of a dissolution, the agreement must be taken as several as well as joint, and that Palmer could sue alone for a breach of it. Lord Justice Cotton said (x): "We must look at the position of the parties with whom this agreement was entered into. They were carrying on business as partners. Although they were partners for life, that partnership might be put an end to, and in fact it has been put an end to, so that they had a joint interest as partners in the business which they carried on as surgeons, accoucheurs, and apothecaries, and they had several interests in it in the event of a dissolution.

(t) *Haddon v. Ayres*, 1 El. & El.
118, p. 149, per Campbell, C. J.

(u) 36 Ch. Div. 411.
(x) *Ib.* p. 420.

That being so, the proper construction of this imperfectly recited agreement is that it is an agreement entered into by the appellant (Mallet) with the partners jointly and severally. I think that in this I am only following the rule laid down by Mr. Baron Parke in *Sorsbie v. Park* (y). And after quoting Mr. Preston's remarks in Sheppard's Touchstone (z), he proceeded: "Now when all we have is this recital, which both parties agree that at present we must treat as the only evidence of a contract, I think, having regard to what I mentioned as being the position of these two gentlemen, Hall and Palmer—as regards, not the partnership business, but as regards the business which was being carried on by them as partners—we ought to regard this as an agreement both joint and several."

"The apparent difference of view (as to whether a covenant can be joint and several on the part of the covenantees) is possibly merely a difference of language. The covenant which one writer would call a joint and several covenant would be, perhaps, termed by another two separate covenants. It is admitted on both sides that covenants are as a rule either joint or several, and not, as regards the covenantees, both joint and several" (a).

In *White v. Tyndall* (b), premises were demised to G. and A., their executors, administrators, and assigns, as tenants in common, and not as joint tenants, at the rent of £150; and G. and A. covenanted for themselves, their executors, administrators, and assigns, that they (the said G. and A., or some or one of them, their executors, administrators or assigns) would pay the said rent and keep the premises in repair. G. died during the term, and the lessor sued A. and G.'s executors for breaches of covenant after G.'s death. The Court of Appeal in Ireland held that the language of the covenant was ambiguous, and

(y) 12 M. & W. 146.

(z) P. 166.

(a) Dicey, Parties to Action, p. 115.

(b) 13 App. Cas. 263.

though using plural words might make the covenant *prima facie* joint, the covenant must be construed as several if the interests were several, and the words of the covenant ambiguous, or even capable of a several construction (c).

The House of Lords, however, held that the words of the covenant plainly imported joint and not several liability, and that the covenant was joint.

"It has no doubt been held that where the interests of covenantees are several, a covenant which in form is joint may be moulded according to those several interests; but that, I take it, is only in the case where, to use the language of Lord Coke, the covenant is to several for the performance of several duties to each of them. Now, in the first place, I would say that I know of no authority for extending such a doctrine to the case of covenantors. It has always, so far as I am aware, been limited to covenantees; and in the present case the covenant is certainly not one by the covenantors for the performance by each of them of several obligations, inasmuch as the covenant to pay rent (to take that as an example) is a covenant to pay one single rent, and not a several rent in respect of his several interest by each of the joint tenants" (d).

And Lord Fitzgerald said (e) :—

"The current of modern decisions has been, as we think it ought to be, to adhere to the very words of the contract when they are plain and unambiguous, and not to depart from them on grounds of hardship and inconvenience. The contract in such cases represents in its language the intention of the parties, and, if they intended otherwise, they should have said so. We ought to hold ourselves bound by the express and unambiguous covenant before us, unless coerced by authority to put on it a different construction from that which its words import.

(c) *Tyndall v. White*, 20 L. R. Ir. p. 523, per Fitzgibbon, L. J.

(d) 13 App. Cas. p. 277, per Lord Herschell.

(e) 13 App. Cas. 263, p. 275.

"The argument was that we should mould the covenant of the lessees because of their separate interests in the subject-matter of the grant, but no decision has been cited going so far. The passage cited from Platt (p. 123) is expressed, 'shall be measured and moulded according to the interests of the covenantees.' No decision to which we were referred goes beyond that.

"*Slingsby's Case* (f) dealt with the several interests of the covenantees, and the illustration put by the Court to some extent shows the reason of the rule in the case of covenantees: and so the rule in *Eccleston v. Clipsham* (g) is confined to the interest of the covenantees: and the paragraph in 'Touchstone' (chap. vii. p. 166, Atherley's edition), founded on *Slingsby's Case*, is to the same effect. There are reasons for the rule applicable to separate interests in the covenantees as regulating the right and form of suit on the covenant, but no authority has been brought under our notice that the rule was applicable to the case of separate interests in the covenantors."

By an agreement under seal between L. and J. of the one part and a company of the other part, L. and J. agreed to sell the patents to the company. Clause 7 provided: "The assignment and transfer of the said letters patent . . . shall be prepared by and at the cost of the said company, and shall be expressed to be made in pursuance of this agreement and of the payment of" the purchase-money, "and the said vendors and all other necessary parties, if any, shall, at the cost of the said company, execute such assignments to the said company, or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned . . . are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the said

(f) 5 Rep. 18a.

(g) 1 Wms. Saund. 153.

company for giving effect to the sale hereby agreed to be made." It was held that L. and J. had jointly covenanted to assign the patents, and that the assignment should contain joint and several covenants by them that the patents were valid (*h*).

(*h*) *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs*, (1900) 2 Ch. A. 280.

CHAPTER IX.

COVENANTS RUNNING WITH THE LAND.

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What cove-
nants run.

A COVENANT is said to run with the land when it "relates to, touches, and concerns" the land in such a way that the right to take advantage of it, or the liability to perform it, passes to the assignee of that land.

"At common law the lessee's covenants ran with the land, but the lessor's did not run with the reversion; the statute 32 Hen. 8, c. 34, was passed to give the reversioner the same benefit that the lessee had" (*a*). In cases not between landlord and tenant, the benefit only runs (*b*), the

(*a*) *Rogers v. Hosegood*, (1900)
2 Ch. A. 388, p. 395, per Far-
well, J.

(*b*) *E.g.*, covenants for title,

Middlemore v. Goodall, Cro. Car.
503; *Kingdon v. Nottle*, 4 M. & S.
53; *Campbell v. Lewis*, 3 B. & Ald.
392; *ante*, p. 59.

burden (unless the assignee takes with notice of a restrictive covenant) does not.

Covenants for the payment of rent (*c*), to insure (*d*), reside on the demised premises (*e*), yield up in repair (*f*), by a lessor to supply water (*g*), and all implied covenants (*h*), have been held to run with the land.

A covenant by the lessee of a public-house that he would conduct and manage the business in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence might be suspended or forfeited was held to run with the land, and to be capable of being enforced by the assignee of the reversion (*i*).

In *White v. Southend Hotel Company* (*k*), a lease by a wine merchant of an hotel for thirty years, at a rent of £1,500 per annum, contained a covenant by the lessee with the lessor, his heirs and assigns, that the lessee would not during the term buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors and assigns; and it was provided that so long as the lessee should observe this covenant the lessor should allow the lessee an abatement of £75 from each quarter's rent. The lessor died during the term, and his wine business was sold by his executors to W. and P. The lessee assigned to the defendants, who continued to buy wine from W. and P., and claimed to deduct £75 a quarter. It was held that the burden of the covenant to buy wine ran with the tenant's interest under the lease, and that the assigns of the tenant were still bound by the covenant, and entitled to the benefit of the proviso for the abatement of rent.

(*c*) *Stevenson v. Lambard*, 2 East, 575.

(*d*) *Vernon v. Smith*, 5 B. & Ald. 1.

(*e*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*f*) *Martyn v. Clue*, 18 Q. B. 661.

(*g*) *Jourdain v. Wilson*, 4 R. & Ald. 266.

(*h*) *Spencer's Case*, 5 Rep. 17, pl. 4.

(*i*) *Fleetwood v. Hull*, 23 Q. B. D. 35.

(*k*) (1897) 1 Ch. A. 767.

In *Clegg v. Hands* (l), A. and B., who were brewers, and also dealers in ale and stout, carrying on business at the X. brewery, demised a public-house to the defendant. By the lease, "lessors" was to include "A. and B., and their and every of their heirs, executors, administrators, and assigns." The lessee covenanted that he would not during the term, directly or indirectly, buy, sell, or dispose of upon the premises, any ales or stout "other than such as shall have been *bond fide* purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and be willing to supply the same to the lessee of good quality, and at the fair current market price."

A. and B. sold their brewery, plant, business, and goodwill to C., a brewer carrying on business at the Y. brewery. The X. brewery was shortly afterwards shut up. The defendant did not get his beer from C. An action was brought by A., B., and C., to restrain the defendant from selling any beer other than beer purchased from C., either directly, or through A. and B. It was held that the covenant ran with the land, and could be enforced by the person entitled to the reversion, and that even if this was not so, the covenant implied a negative which could be enforced.

A covenant in the lease of a public-house to manage the same "in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued, or forfeited, or be in any danger of being suspended, discontinued, or forfeited," runs with the land, and can be enforced by the assignee of the reversion (m).

Collateral
covenants.

"A covenant which does not directly affect the nature, quality, or value of the land, or the mode of occupying it,

(l) 44 Ch. Div. 503.

(m) *Fleetwood v. Hull*, 23 Q. B. D. 35.

is a collateral covenant" (n), and will not bind the assignee of the land, although assigns are expressly named in the covenant.

So where, in a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill who were settled in other parishes without a certificate, the covenant was held to be collateral, and not binding on the assignee of the lessee (n).

A covenant to pay for all trees planted by a lessee has been held not to run with the land (o).

Although in cases not between lessor and lessee it is not necessary that the *covenantor* should be connected with the land to make the benefit of a covenant run with the land, the *covenantee* must have an estate in the land. So where an abbot and convent covenanted to sing for the covenantee and his heirs in a chapel, parcel of a manor of which the covenantee was lord, the covenant passed to an assignee of the manor; "but if such covenant were made to say divine service in the chapel of another, then the assignee shall not have an action of covenant" (p).

Covenantee must have an estate in the land.

But in such a case the original covenantee could sue (q). An assignee, to be enabled to sue, was compelled to be in of the same estate as the original covenantee. Where a conveyance was made to uses to bar dower, with a power of appointment, therefore, the covenants were usually made with the feoffee to uses and his heirs (r); otherwise, the effect of exercising the power would be to terminate covenants made with the *cestui que* use and his heirs (s).

Where, on the whole of a vendor's land being sold, the

(n) *Mayor of Congleton v. Pattinson*, 10 East, 130; cf. *Gower v. Postmaster-General*, 57 L. T. Rep. 527.

(o) *Grey v. Cuthbertson*, 2 Chit. 682; 4 Doug. 351.

(p) *Spencer's Case*, 5 Rep. 18; Co. Lit. 384.

(q) *Stokes v. Russell*, 3 T. R. 678.

(r) *Sug. V. & P.* 578.

(s) *Rosch v. Wadham*, 6 East, 289.

purchaser enters into a restrictive covenant, the executor of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the death of the vendor (*t*).

Semble, covenants did not run with the reversion at common law.

It is a doubtful point whether any covenant could, at common law (independently of 32 Hen. 8, c. 34), be sued upon by the grantee of the reversion.

In *Harper v. Burgh* (*u*), a lessee for forty years demised to the defendant for twenty years at a rent of £16, which the defendant covenanted to pay, and then assigned the reversion to the plaintiff, and released the covenants to the defendant. It was held that the plaintiff was entitled to succeed in an action of covenant for non-payment of rent, as the *reddendum* constituted a covenant in law which ran with the reversion at common law independently of the statute of 32 Hen. 8.

And Bayley, J., lays down that "an action at the suit of the assignee of the reversion is maintainable in some cases at common law, in others under the statute of 32 Hen. 8" (*x*).

On the contrary, it is laid down in *Thrale v. Cornwall* (*y*), "at common law covenant did not lie against the lessee, but is given by the statute 32 Hen. 8, c. 34"; and Serjeant Williams states that "the better opinion seems to be that the assignee of the reversion could not bring an action of covenant at common law, but it is given by statute" (*z*).

32 Hen. 8,
c. 34.

By 32 Hen. 8, c. 34, s. 1, after reciting that divers had leased manors, &c., or other hereditaments for life or years, containing certain conditions, covenants, and agreements, as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors

(*t*) *Formby v. Barker*, (1903) 2 Ch. A. 539.

(*u*) 2 Lev. 202.

(*x*) *Vyvyan v. Arthur*, 1 B. & C. 414; 2 D. & R. 670; cf. *Thursby*

v. Plant, 1 Wms. Saund. 240.

(*y*) 1 Wils. 165; cf. *Barker v. Damer*, 3 Mod. 338; *Webb v. Russell*, 3 T. R. 401.

(*z*) 1 Wms. Saund. 240, n. 3.

and grantors, their heirs and successors, and that by the common law no stranger to any covenant or condition could take advantage thereof, it was enacted that "all persons and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the king, of any lordships, manors, lands, &c., which did belong or appertain to any of the monasteries, &c., or which belonged to any other person, and also all other persons (*a*), being grantees (*b*) of the king or any other person or persons, and the heirs, successors, and assigns of every of them (*c*), shall and may have (*d*) the like advantage by entry for non-payment of rent for doing waste or other forfeiture, and the same remedy by action only for not performing other conditions, covenants, and agreements contained in the said leases against the lessees and grantees, their executors, administrators, and assigns, as the lessors and grantors ought, should, or might have had at any time or times."

And by sect. 3 all farmers, lessees and grantees of lordships, &c., rents, tithes, pastures or other hereditaments, their executors, administrators and assigns (*e*), shall and may have like action and remedy against all persons,

(*a*) Though after breach and before action brought their estate determines, *Bac. Abr. Covenant E. 6.*

(*b*) Under this statute covenant will lie by the assignee of the reversion of part of the demised premises against the lessee, *e.g.*, for not repairing (*Twynam v. Pickard*, 2 B. & Ald. 105), or by the original reversioner after he has assigned the reversion in part of the premises : *Swansea Corporation v. Thomas*, 10 Q. B. D. 48.

(*c*) *Quære*, does this imply that the grantee shall not? *Beely v. Purry*, 3 Lev. 155, does not decide the point. In *Green v. James*, 6

M. & W. 651, it was taken for granted that the grantor could not sue when the right of action is given to the assignee by this statute. But cf. *Eccles v. Mills*, (1898) A. C. 360, p. 371; *Stuart v. Joy*, (1904) 1 K. B. A. 362.

(*d*) See *Thursby v. Plant*, 1 Wms. Saund. 377; *Couran v. Pedeler*, 2 Tr. C. L. Rep. 200. An assignee can bring ejectment for breach of a covenant without giving the lessee notice of the assignment : *Scaltock v. Harston*, 1 C. P. D. 106.

(*e*) But an under-lessee is not such an assign : *Bac. Abr. Covenant E. 6*, p. 538.

bodies politic, their heirs, successors and assigns, which by grant of the king or other persons shall have the reversion of the same lordships, &c., so letten or any part thereof for any conditions, covenant or agreement contained in their leases as the lessees or any of them might or should have had against the lessors and grantors, their heirs and successors, recovery in value by reason of any warranty in deed or law excepted.

A lessor who has assigned his reversion remains liable upon his express covenant running with the reversion in a lease for years under seal (*f*).

"The covenants whereof grantees by this statute shall take advantage are inherent covenants—*i.e.*, covenants as do concern the thing granted and tend to the supportation of it" (*g*).

Where land was devised to the use of A. for life, with remainder to B. for life, with power to lease, it was held that B. was an assignee within the meaning of the statute 32 Hen. 8, c. 34, and was entitled to sue on the covenants in a lease granted by A., on the ground that the lease must be considered as emanating from the person who created the power, and as deriving its force and authority from him, and that B., coming in as second tenant for life under the will of the person who created the power, stood in the relation of assignee to him (*h*).

The fact that a man is only assignee of part of the interest created by a lease will not preclude him from suing upon and recovering damages for breach of a covenant contained therein. Thus one tenant in common, an assignee of five-sixths of the interest created by a lease, was held entitled to sue for breach of a covenant to renew without joining the assignee of the other one-sixth (*i*).

(*f*) *Stuart v. Joy*, (1904) 1 K. B. A. 362; cf. *Eccles v. Mills*, (1898) A. C. 360.

(*g*) *Shep. Touch.* 176.

(*h*) *Isherwood v. Oldknow*, 3 Man. & Sel. 382, 402.

(*i*) *Simpson v. Clayton*, 4 Bing. N. C. 758, p. 780; 6 Scott, 469; 1 Arn. 299.

When a man takes an assignment of a lease by way of mortgage as a security for money lent, he becomes liable on the covenant for payment of rent though he has never occupied (*k*).

So where A. demised premises to B. for twenty-one years, and B. demised the premises for the residue of the term, less the last twenty-one days, to C., and afterwards by deed poll assigned his reversion to A., who mortgaged his estate to the plaintiff, while C. assigned his term to the defendants by way of mortgage, the defendants were held liable to the plaintiff for a breach of a covenant contained in C.'s lease (*l*).

By sect. 10 of the Conveyancing and Law of Property Act, 1881 (*m*)—

“(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

“(2) This section applies only to leases made after the commencement of this Act.”

Before this Act the benefit of a lessee's covenants passed to the assign of the reversion in part of the lands, *so far as the covenants related to that part* (*n*), and the burden of a

(*k*) *Williams v. Bosanquet*, 1 Brod. & B. 238.

(*m*) 44 & 45 Vict. c. 41.

(*l*) *Burton v. Barclay*, 7 Bing. 745; 5 M. & P. 785.

(*n*) *Twynnam v. Pickard*, 5 B. & Ald. 105.

covenant to repair, being divisible, would have passed to an assignee of part of the lands (o).

"It is conceived that the wide language of this section must be subjected to a similar restriction, and that the owner of the reversion in part can enforce only such covenants as refer to that part" (p).

Where a lease is made by a mortgagor in possession, under the powers conferred by the Conveyancing and Law of Property Act, 1881, the mortgagee, on giving notice to the tenant, and going into possession, is entitled to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such right cannot be affected by any collateral agreement between the lessor and lessee.

Thus, where a mortgagor in possession let to a tenant with an agreement that, instead of paying the rent, he should keep it as against an advance made by him to the mortgagor, it was held that this was an independent agreement, and did not affect the mortgagee, who was entitled to enter for breach of covenant independently of any collateral agreement (q).

To be within 32 Hen. 8, c. 34, covenants must have been entered into with the legal owner of the reversion. This section gives the right to sue to the beneficial owner, *i.e.*, the person entitled to the income, as well as the legal reversioner (r).

By sect. 11 of the Conveyancing Act, 1881 (r), "The obligations of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and so far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that rever-

(o) *Congham v. King*, Cro. Car. 221.

(p) *Hood and Challis' Conveyancing Act* (5th ed.), p. 54.

(q) *Municipal Permanent Investment Building Society v. Smith*, 22 Q. B. Div. 70.

(r) *Wolstenholme, Conveyancing Acts* (8th ed.), p. 50.

sionary estate or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if, and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled (s).

“This section only applies to leases made after the commencement of this Act.”

This section makes legally binding on the successors in title of a person who grants a lease under a power all covenants which as against the remainderman the grantor has power to enter into (s).

In *Wilson v. Queen's Club* (t), a mortgagor in possession of land laid out for building granted a building lease of part of the land to A. (pursuant to sect. 18 of the Conveyancing and Law of Property Act, 1881), to which the mortgagees were not parties, in consideration of buildings recently erected. The mortgagees subsequently conveyed a part of the land adjoining the houses to B., who used it as a cricket ground, and erected a hoarding on the boundary adjoining the houses to prevent the occupiers from overlooking the cricket ground. This hoarding substantially diminished the light of the basement windows. It was held that the mortgagees were bound by the lease, as though they had been parties to it; that A. was entitled to an unobstructed access of light to his houses, subject only (if at all) to restriction from buildings erected on other parts of the land, and that the hoarding was not a building, and must be removed.

By sect. 58 of the Conveyancing and Law of Property Act, 1881 (u)—

“(1) A covenant relating to land of inheritance, or devolv-

(s) *Wolstenholme, Conveyancing Acts* (8th ed.), p. 51.

(t) (1891) 1 Ch. 522.

(u) 44 & 45 Vict. c. 41.

ing on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

"(2) A covenant relating to land not of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed."

This section seems to be a restatement of the law as previously established (*x*), except that it enables the draftsman to omit the words "heirs and assigns," or "executors, administrators, and assigns," in certain cases after the name of the covenantee.

In all other cases (than that of a lease) the obligation of a covenant relating to land is carried no further than before the Act, and to bind the assigns they must still be mentioned where mention was necessary before the Act, for instance, in a lease where the covenant concerns a thing not *in esse* at the time of the demise, as to build a wall (*y*).

With what Covenants run.

Not with
personal
goods.

In *Spencer's Case* (*z*), it was resolved: "If a man leases sheep or other stock or cattle, or any other personal goods, for any time, and the lessee covenants for himself and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them, and the lessee assigns such sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion."

Thus where a defendant was an assignee of an assignee

(*x*) *Lougher v. Williams*, 2 Lev. 92; Co. Lit. 385a; Bac. Abr. Cov. E. (2).

(*y*) *Wolstenholme's Conveyancing Acts* (8th ed.), p. 116.

(*z*) 5 Rep. 16.

of a wine-licence lease made by the plaintiff rendering £41 per annum, and it appeared that the defendant was a purchaser of his lease for valuable consideration, and had no notice of the rent reserved upon the original lease, a bill to be relieved against the defendant was dismissed because it was "only a personal contract, which did not run with the licence, as in case of a lease of a fair rendering rent an action of debt does not lie against the assignee;" and *æquitas sequitur legem* in this case, especially when the assignee is a purchaser for valuable consideration without notice (*a*).

So covenants will not run with rent (*b*), but will with an assignable right to dig for minerals (*c*) (although it was at one time thought that covenants would not run with incorporeal hereditaments) (*d*), with tithes (*e*), as being a "tenth part of the profits of the lands, the profits of the land is the land itself, tithes are tangible and visible, may be put in view in an assize; an ejectment lies for them" (*f*), with a right to take and kill game on land (*g*), with estates by estoppel (*h*).

The assignee of a term is bound to perform all the covenants annexed to the estate, although not named (*i*), but not when the assignment is purely equitable (*k*), and when named he will be liable upon covenants to do something, *e.g.*, to build a wall upon the land demised (*l*).

Assignee bound by covenants annexed to estate.

It has been suggested that, although a covenant to build

(*a*) *James v. Blunck*, Hard. 88.

(*b*) *Milnes v. Branch*, 5 M. & S. 411; *Randall v. Rigby*, 4 M. & W. 135.

(*c*) *Martyn v. Williams*, 1 H. & N. 817; *Norval v. Pascoe*, 10 Jur. N. S. 792.

(*d*) *City of London v. Richmond*, 2 Vern. 423; *Earl of Portmore v. Bunn*, 1 B. & C. 694; *Muskett v. Hill*, 5 Bing. N. C. 694.

(*e*) *Bally v. Wells*, 3 Wils. 25,

p. 30; Wilm. 341.

(*f*) 3 Wils. p. 30; cf. *Dyer*, 85a.

(*g*) *Hooper v. Clark*, L. R. 2 Q. B. 200.

(*h*) *Cuthbertson v. Irving*, 4 H. & N. 742.

(*i*) Bac. Abr. Cov. E. (3).

(*k*) *Cox v. Bishop*, 8 De G. M. & G. 815.

(*l*) *Spencer's Case*, 5 Rep. 16; *Doughty v. Bowman*, 11 Q. B. 444.

on land demised would not bind an assignee, unless named, a covenant to keep the building from time to time upon the land demised in repair would run with the land, and bind the assignee, although unnamed (*m*).

Burden only runs between landlord and tenant.

Except in cases between landlord and tenant, no covenant (other than a restrictive covenant) which imposes a burden upon land would seem to run with the land, unless the covenant does upon the true construction of the deed amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land (*n*).

Holmes v. Buckley (*o*) was a case in which B. and his wife, in 1622, granted a watercourse through the wife's lands to A., and covenanted for themselves, their heirs and assigns, to keep it in repair, and suffer a common recovery to establish the grant, and suffered a common recovery accordingly. By mesne assignments the watercourse passed to the plaintiff, and the land to the defendant, who built upon the same, and heightened the ground over the watercourse, whereby it became more inconvenient to repair, and the building obstructed the watercourse. The Court was of opinion that this was a covenant which ran with the land, and though the plaintiff had cleansed the same while it was easy to be done, yet since the right was plain upon the deed, and *the cleansing made chargeable by the building*, it was reasonable that the defendant should do it.

"This case," says Lindley, L. J. (*p*), "looks a little like it (*i.e.*, the burden running with the land) at first, but the observation to be made on that case, I think, is this: In the first place, it is quite plain that there the plaintiff had a cause of action: he was entitled to an injunction of some

(*m*) *Minshull v. Oakes*, 2 H. & N. 793.

(*n*) *Cook v. Arundel*, Hard. 87, pl. 3; 1 Eq. Cas. Abr. 26; *Haywood v. Brunswick Building Society*, 8 Q. B. Div. 408; *Auster-*

berry v. Corporation of Oldham, 29 Ch. Div. 750.

(*o*) 1 Eq. Cas. Abr. 27; Prec. Ch. 39.

(*p*) 29 Ch. Div. 782.

sort to restrain the defendant from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree that was pronounced. I fail to understand the exact grounds of the decision specifically enforcing that covenant to cleanse. I doubt if it was a decision to that effect, but the point is too barely reported to be a guide on that point."

"*Morland v. Cook* (q), another case in which it was said that the covenant ran with the land, is intelligible on this ground, that there was there that which amounted to the creation of a rent-charge for the repair of the sea-wall which was in question."

In *Brewster v. Kidgill* (r), B., who was seised in fee of a manor, in consideration of £800, granted a rent-charge in fee of £40 per annum, and on the back of the deed was endorsed a memorandum declaring it to be the true intent and meaning of that deed "that the grantee and his heirs shall for ever hereafter be paid the said rent-charge without any deduction or abatement of taxes, charge or payment out of, for, or concerning the said rent or the said manor or lands charged therewith." The question arose whether, as the judges, excepting Lord Holt, held, the memorandum was part of the grant, or a covenant collateral to the grant, as Lord Holt conceived. All agreed that if a part of the grant, it ran with the land, while if it was a covenant to pay, it did not run with the land.

In *Mayor of Carlisle v. Blamire* (s), it seems to have been assumed by Lord Ellenborough that a covenant not to divert water would run with the land; but the point was not decided, as the defendant was only the devisee of the equity of redemption, and the legal estate was outstanding in the mortgagee.

Where lessees of certain ironworks covenanted with the proprietors of a railway and their assigns that they, their

(q) L. R. 6 Eq. 252.

(r) 12 Mod. 166.

(s) 8 East, 287.

executors, administrators, and assigns, would procure all the limestone wanted for their works from a certain quarry, and carry it along the railway, paying a certain toll, and B. purchased the works with notice of the covenant, it was held that the covenant did not run with the land so as to bind him at law, and that a Court of Equity would not compel him to perform it (*t*).

But so far as *Keppell v. Bailey* (*t*) decides that a restrictive covenant as to the use of land, which does not run with the land at law, is not binding in equity upon an assignee with notice, it has been overruled by more recent cases (*u*).

In equity, a person who takes land with notice of a restrictive covenant, whether actual or constructive (*x*), will be bound by it, unless the covenant has been waived, *e.g.*, by acquiescence in its breach (*y*), or circumstances have arisen rendering it inequitable to enforce the restrictive covenant.

Restrictive
covenants.

In the leading case on this subject, that of *Tulk v. Moxhay* (*z*), the plaintiff, in 1808, sold a vacant piece of ground in Leicester Square to Elms, who covenanted for himself, his heirs and assigns, with the plaintiff to keep the ground as an open space or garden. The land, after several mesne conveyances, passed into the hands of the defendant, who entered into no covenant, but admitted that he purchased with notice of the covenant in the deed of 1808. It was held that the defendant could not be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased.

In *Cooke v. Chilcott* (*a*), a purchaser of a piece of land,

(*t*) *Keppell v. Bailey*, 2 My. & K. 517.

(*u*) *Luker v. Dennis*, 7 Ch. D. 227; *Parker v. White*, 1 H. & M. 167.

(*x*) *Clements v. Welles*, L. R. 1 Eq. 200; *Wilson v. Hart*, L. R. 1

Ch. 463; *Patman v. Harland*, 17 Ch. Div. 353.

(*y*) *Gibson v. Doeg*, 2 H. & N. 615; *Sayers v. Collyer*, 28 Ch. Div. 103, *ante*, p. 135.

(*z*) 2 Ph. 774.

(*a*) 3 Ch. D. 694.

with a spring upon it, covenanted with the vendor, who retained adjoining land intended to be used as building land, to erect a pump and reservoir, and to supply water from the spring to all houses built upon the vendor's land. It was held by Malins, V.-C., that the benefit and the burden ran with the land, and that, if not, a sub-purchaser with notice of the covenant was bound to perform it.

"If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think that there is much to show that the ground of the decision was that Malins, V.-C., was of the opinion, wrongly as it now turns out, that the covenant ran with the land" (b). And it has now been definitely overruled (c), and it is clearly laid down that the *Tulk v. Moxhay* (f) principle only applies to negative covenants.

In *Haywood v. The Brunswick Permanent Building Society* (d), land was granted in fee in consideration of a rent-charge and a covenant to build and repair buildings. It was held that the assignee of the grantee of the land was not liable in law, or in equity on the ground of notice, to the assignee of the grantee of the rent-charge on the covenant to repair, for at common law, a covenant to build does not run with the rent into the hands of an assignee (e), and the question being reduced to an equitable one, *Tulk v. Moxhay* (f) decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced.

In *London and South Western Railway Company v. Gomm* (g), Jessel, M. R., states the effect of the decision in *Haywood v. The Brunswick Permanent Building Society* (d) :

(b) *Haywood v. Brunswick Building Society*, 8 Q. B. Div. 408.

(c) *Austerberry v. Corporation of Oldham*, 29 Ch. Div. 750; *Hall v. Ewin*, 37 Ch. Div. 76.

(d) 8 Q. B. Div. 403.

(e) *Id.* p. 407, per Brett, L. J. :

Milnes v. Branch, 5 M. & S. 411.

(f) 2 Ph. 774.

(g) 20 Ch. Div. 582.

“The Court then decided that they would not extend the doctrine of *Tulk v. Moxhay* (g) to affirmative covenants, compelling a man to lay out money, or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. The covenant in *Tulk v. Moxhay* (g) was affirmative in terms, but was held by the Court to imply a negative.”

In *Austerberry v. Corporation of Oldham* (h), A., by deed, conveyed for value a piece of land to trustees as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed; and in the conveyance the trustees covenanted with A., his heirs and assigns, that they the trustees, their heirs and assigns, would make the road, and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded by other land of A., who sold this adjoining land to plaintiff. The trustees made the road, and sold the road to the defendants. Both the plaintiff and the defendants bought with notice of the covenant. It was held that the plaintiff could not enforce the covenant against the defendants.

“Where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity restrain anyone who takes property with notice of that covenant from using it in a manner inconsistent with that covenant. But here the covenant which is attempted to be insisted upon is a covenant to lay out money in doing certain work upon the land, and that being so, in my opinion that is not a covenant a Court of Equity will enforce; it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way undertake a burden upon themselves. The covenantor must not use the property

(g) 2 Ph. 774.

(h) 29 Ch. Div. 750.

for a purpose inconsistent with the use for which it was originally granted; but in my opinion a Court of Equity does not and ought not to enforce a covenant binding only in equity in such a way as to require the successors of the covenantor himself, they having entered into no covenant, to expend sums of money in accordance with what the original covenantor bound himself to do" (i).

"The doctrine of *Tulk v. Moxhay* (k), rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* to another line of cases, or else an extension in equity of the doctrine of negative covenants; such, for instance, as a right to the access of light which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk v. Moxhay* (k) was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant, express or implied, e.g., not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that, if he acquired the legal estate for value without notice, he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate, he took subject to the burden, whether he had notice or not" (l).

Principle upon which restrictive covenants are enforced.

(i) 29 Ch. Div. 750, per Cotton, L. J., p. 773.

(k) 2 Ph. 774.

(l) *London and South Western Railway Company v. Gomm*, 20 Ch. Div. 583, per Jessel, M. R.

In *Evans v. Davis* (m), E. agreed to grant a lease to D. containing certain specified covenants. The lease under which E. held contained a covenant not to "affix or permit any outward mark or show of business to be affixed" on the demised premises. Davis granted a lease of two rooms to Brown, a tailor, and Brown put up in one of the rooms a wire blind with the name of his firm on it, and affixed a brass plate with the name of the firm to the iron railings outside the entrance. Davis admitted in his pleadings that the blind was erected with his licence, and that he allowed Brown to put up a moveable brass plate, but required that this should be approved by the lessor, which was not done. An injunction was granted against Davis as well as Brown.

In *Nicoll v. Fenning* (n), on the sale of part of an estate laid out for building to Collins, the trustees of the estate covenanted that they, their heirs and assigns, would not sell any part of the estate without requiring from the purchaser a covenant "not to erect thereon or use or permit to be used any building to be erected thereon as a tavern, public-house, or beer-shop." In 1870 a further portion of the estate was sold to a gas company, who entered into the above covenant, and the rest of the estate was sold to other persons. In 1879 Prosser purchased part of the land from the gas company, and entered into a similar covenant with them. Prosser let a house on the land conveyed to him to Fenning, under an agreement not to use it for any business except for the sale of beer not to be drunk on the premises, and wines and spirits under a grocer's licence, without Prosser's consent in writing, and Fenning obtained an off-licence, under which he sold beer. An injunction was granted against both Prosser and Fenning.

In both these cases the injunction was granted against persons who were not the original covenanting parties, but

(m) 10 Ch. D. 747.

(n) 19 Ch. D. 258; cf. *Michell v. Steward*, 14 L. T. Rep. 134.

took their interest with full knowledge of the restrictive covenant, and took active steps to break it; in the one case actually licensing a breach, in the other letting a house expressly that it might be used in breach of the covenant. If there had been mere non-feasance by standing by and taking no action, Davis in the one case, and Prosser in the other, would not have been liable in equity; but under the circumstances, though not liable at law, they were in equity restrained from using land in a way in which they knew that those from whom they derived title could not use it. Having knowledge of the restrictive covenant at the time of purchase, they probably gave a less price on that account, and it was therefore equitable that they should be restrained from breach of covenant (o).

In *Mander v. Falcke* (p), the owners of a freehold reversion sued A. and his son B. to restrain them from using the demised premises as a brothel. The house was vested in B. under an underlease, but it was not shown that A. had any legal or equitable interest in it. The evidence showed A. to be in joint or sole occupation of the house, and to be managing the business with knowledge that the lease contained a covenant "not to do or cause or permit to be done upon the premises anything which might grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises or of the adjoining property of the lessors, or the occupiers thereof." An injunction was granted against both A. and B.

In *Hall v. Ewin* (q), premises were leased for a term of Nonfeasance. eighty years to T., who covenanted for himself and his assigns "not to use, exercise, carry on, or permit or suffer the same to be occupied by any person or persons who shall carry on any noisome or offensive trade." In 1851 T. mortgaged the term (less the last three days) to C., who in 1865 conveyed to Ewin under the power of sale con-

(o) Cf. *Richards v. Revitt*, 7 Ch. D. 224.

(p) (1891) 2 Ch. A. 554.

(q) 37 Ch. Div. 74.

tained in his mortgage. In 1885 Ewin leased the premises to McNeff, and took from him a covenant not to carry on any noisome or offensive trade. In 1886 McNeff exhibited two lions and a black man upon the premises, and an injunction was granted by Kekewich, J., against both Ewin and McNeff, restraining them from such user, mainly on the ground of the use of the word "suffer," and that Ewin having the power to restrain McNeff, and not having done so, had broken the covenant.

On appeal, it was held that to consider Ewin liable in the absence of proof that he had licensed the user by McNeff was a wrong extension of the *Tulk v. Moxhay* principle, and the remarks of Jessel, M. R., were cited: "Did anyone ever hear of an action against a man because he did not bring an action against his neighbour? It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour" (r).

To whom the
benefit
extends.

In *Child v. Douglas* (s), land was laid out for building, and roads were projected. The defendant bought a plot of land and a right of way over a projected street, and the vendor reserved a similar privilege over the street in front of the plot sold to the defendant. The defendant covenanted with the vendor not to erect any building on his plot within six feet of the projected street. The plaintiff, a subsequent purchaser of a neighbouring plot, was held entitled to enforce the covenant, as he must be taken to have bought all the rights connected with this portion of the land (especially if he has bound himself by a similar covenant), and this whether at the time of the purchase he had notice of the covenant or not.

In *Keates v. Lyon* (t), A. sold part of an estate to B.,

(r) *Attorney-General v. Guardians of Poor of Dorking*, 20 Ch. Div. 595, p. 605.

(s) *Kay*, 560.

(t) *L. R. 4 Ch. 218*; cf. *Renals v. Cowlishaw*, 11 Ch. Div. 866.

who entered into restrictive covenants for himself, his heirs and assigns, with A., his heirs, executors, and administrators, as to buildings on the purchased property, but A. entered into no covenants as to the land retained. After this, A. sold to other persons various portions of the land retained, but nothing appeared as to the contents of the conveyances, nor was there any evidence that they were informed of the covenants entered into by B. After this, A. bought back from B. what he had sold to him, and it was held that the benefit of B.'s covenant did not in equity pass to the subsequent purchasers of other parts of the estate from A., and that A., after the re-purchase, could make a title to the re-purchased land discharged from the covenants.

"There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others" (u).

"If a man makes a representation that property is

Representation may

(u) Nottingham Patent Brick and Tile Company v. Butler, 16 Q. B. Div. 778, p. 785, per Esher, M. R.

amount to a contract.

subject to covenants affecting it permanently, and he does so in order to induce a person to buy part of such property, and the person buys on the faith of such representation, the representation amounts to a contract by the vendor that he will not do anything to prevent the property continuing what he has represented it to be" (x).

In *Piggott v. Stratton* (y), the defendant Stratton in 1845 took a lease of two plots of building land, and entered into a covenant not to build houses less than thirty yards apart. Stratton entered into negotiations with Harbour as to an underlease of one of the plots, and was told by him of the covenant, and, after inspecting the lease, took an underlease of this part, in which Stratton covenanted to observe the covenants in the original lease. In 1854 Stratton surrendered his original lease, and had a fresh lease with different covenants granted to him. The plaintiff, an assignee of Harbour's, was held entitled to enforce the covenants contained in the original lease.

In *Spicer v. Martin* (z), there was a conveyance in fee in 1867 of a house, No. 2, Cromwell Gardens, with a covenant by the purchaser, Spicer, "that he, his heirs and assigns, would not carry on or permit to be carried on upon the premises any trade or business, but would keep and use them for a private dwelling-house only, and not do anything to the annoyance," &c. of the neighbouring inhabitants.

There were six similar conveyances of Nos. 1, 3, 4, 5, 6, and 7, Cromwell Gardens. In 1874 the plaintiff took a lease of No. 2 from Spicer, after having received from him a letter stating "the draft was in the form usual on the estate." He now brought an action to restrain the user of Nos. 1, 3, 4, 5, 6, and 7 as an hotel, and succeeded.

This decision was affirmed in the House of Lords (a) on

(x) *Martin v. Spicer*, 34 Ch. Div.
1, p. 12, per Lindley, L. J.
(y) 1 De G. F. & J. 33.

(z) 14 App. Cas. 12.
(a) *Spicer v. Martin*, 14 App.
Cas. 12.

the ground that every lessee must have known that every other lessee was bound to use his house as a private residence only, and "this restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation" (b).

In *King v. Dickeson* (c), the purchasers of each lot of a building estate covenanted with the vendor and with the other purchasers not to build beyond a specified building line. One of the purchasers mortgaged part of his lot, and the mortgagee (who had notice of the covenant) foreclosed. It was held that the mortgagor could not enforce the covenant against a purchaser from his mortgagee. North, J., said (d): "The question for my decision is whether the defendants, who are purchasers of part of lot 258, upon which they are proposing to build beyond the building line, can be restrained from so doing—not by the purchaser of another lot, but by the owner of the remainder of the same lot 258. There was no agreement entered into between the plaintiff and his mortgagees as to the user of the land comprised in the mortgage, and though, no doubt, the mortgagees took the land subject to the obligations then existing in respect of it, and therefore subject to the right of the owners of the other lots to compel the observance of the restrictive covenants, there was nothing to prevent the owner of lot 258 from building upon it in any way he pleased, provided that none of the owners of the other lots objected to his doing so."

In *Re Birmingham and District Land Company and Allday* (e), a land company put up freehold building sites for sale by auction in lots, subject to particulars and conditions of sale which, in the view of the Court, constituted

(b) *Spicer v. Martin*, 14 App. Cas. 25, per Lord Macnaghten.

(c) 40 Ch. D. 596.

(d) *Ib.* p. 599.

(e) (1893) 1 Ch. 342.

an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon. At the auction some of the lots were sold, and some were not, and after the sale the vendors claimed the right to sell the unsold lots free from the restrictive covenants. It was held that the purchaser of one of the lots sold at the auction who had not completed his purchase was entitled to the benefit of the contract implied from the conditions of sale; that the vendors would as to the unsold lots observe stipulations similar to those imposed on purchasers, and that the purchaser was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

A purchaser is entitled to a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others (*f*).

Building
scheme.

In *Davis v. Corporation of Leicester* (*g*), the corporation in 1887 desired to dispose of a portion of their property according to a building scheme, and some lots were put up to auction in accordance with certain conditions of sale. The plaintiff subsequently purchased three lots by private contract, and covenanted in his conveyance to abstain from doing certain things; but there was no similar covenant by the vendor. Two Lords of the Treasury joined in the conveyance to the plaintiff to show the approval of the Treasury. It was held that, although the corporation would have been bound by the building scheme if it had been an ordinary individual, the Treasury had only approved of what was to be found in the conveyance, and that the plaintiff could not prevent building on other lots in a manner inconsistent with the conditions.

Affirmative
covenant
which did not

In *Holford v. Acton Urban District Council* (*h*), there was a sale by auction of certain land. A condition pro-

(*f*) *Re Wallis and Barnard's*
Contract, (1899) 2 Ch. 515.

(*g*) (1894) 2 Ch. A. 209.
(*h*) (1898) 2 Ch. 240.

vided that "the purchasers of lots 3, 4, 5 and 6 shall, in their respective conveyances, enter into covenants with the vendors to erect within two years from the day of sale, upon each of the lots bought by them, a shop and dwelling-house of not less value at prime cost than £800, and the purchaser of lot 7 shall enter into a similar covenant to erect a shop and dwelling-house of not less value at prime cost than £650." imply a
negative

The plaintiff purchased lot 2. Lots 3 to 7 inclusive were not sold at the auction. Ultimately the successors in title of the vendors obtained the sanction of the Local Government Board to the erection of a fire-engine station at the cost of £3,310. This was alleged by the plaintiff to be an infringement of the building scheme, on the faith of which he bought the property.

Stirling, J., said that it was clear that the defendants were bound to observe the stipulation; but it was also clear that they could not be compelled to erect shops, or to maintain the shops and dwelling-houses when erected. The conditions of sale were departed from in two matters, (1) one building was to be erected on four lots instead of a separate building on each lot, and (2) the building proposed to be erected was not in any sense a shop or dwelling-house, and proceeded :—

"Now ought I to imply from the conditions of sale that there is any stipulation that nothing but separate buildings shall be erected, or that nothing but shops and dwelling-houses shall be erected upon the land? It is to be observed that there is no covenant, no express stipulation that the buildings to be erected shall be maintained for ever as shops and dwelling-houses. There is nothing, as it seems to me, to prevent a person who bought all the lots from erecting in the first instance buildings which were shops and dwelling-houses, and afterwards throwing them into one by alterations of the party walls between them, or from using the single building so formed otherwise than as a shop or dwelling-house. Such a restriction ought not to be im-

plied except when the contract as expressed in writing would, in the language of the Lord Justice (i), be futile, or would not carry out the intention of the parties. It does not seem to me that such a restriction could fairly be said to have been within the contemplation of the parties, or that the condition as it stands is futile. . . . That being so as regards the shops and dwelling-houses when once erected, I do not think I ought to infer a negative stipulation that nothing but shops and dwelling-houses should be erected" (k).

When once a vendor has offered a property for sale under a building scheme, and has sold part of it, he is not at liberty to authorize subsequent purchasers to depart from the building scheme (l).

But such a power may be expressly reserved to the vendor.

A corporation having acquired land to widen a street, sold surplus land by auction under conditions requiring the purchaser to observe the by-laws as to building. The corporation reserved the right to waive or to alter any of the stipulations as to any land not sold at this sale or (with the consent of the purchaser thereof) as to any land so sold. The corporation consented to alter the plans of a purchaser so that the air-space required by the by-laws was provided out of a square, and not out of the land sold at the sale.

Another purchaser was held not entitled to prevent the erection of the proposed building, as there was no building scheme which the corporation was not at liberty to alter (m).

In *Rogers v. Hosegood* (n), the owners of building land and their mortgagees conveyed a plot of land in fee to a

(i) Bowen, L. J., in *Oriental Steamship Company v. Tylor*, (1893) 2 Q. B. A. 518, p. 527.

(k) (1898) 2 Ch. 248.

(l) *Mackenzie v. Childers*, 43 Ch.

D. 265.

(m) *Attorney-General, &c. v. Mayor of Richmond*, 89 L. T. Rep. 700.

(n) (1900) 2 Ch. A. 388.

purchaser, who covenanted with the mortgagor that no more than one messuage or dwelling-house should at any one time be erected or be standing on the plot, and that such messuage should be adapted for and used as and for a private residence only. The deed stated that the covenants therein contained were entered into with intent that they might so far as possible bind the premises thereby conveyed and every part thereof, in whosoever hands the same might come, and might enure to the benefit of the mortgagors, their heirs and assigns, and others claiming under them, to all or any of their lands adjoining or near to the said premises. The mortgagors afterwards conveyed another plot of adjoining land to a purchaser who had no knowledge of the covenant, but it was held that the assigns of the second plot were entitled to enforce it.

“When the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser’s conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser’s conscience and the equity affecting it can come into discussion” (o).

“Negative covenants in a conveyance in fee restricting the rights of the purchaser to use the land purchased may be considered as falling under these classes: First, where the vendor simply obtains a covenant from the purchaser

(o) (1900) 2 Ch. A. p. 407, per Collins, L. J.

for his own benefit; secondly, there is the case where the vendor obtains covenants from the purchaser for his own benefit in his capacity of owner of a particular property; and the third is where the covenant is entered into for the benefit of the vendor, in so far as he reserves unsold property, and also of other purchasers as part of what is called a building scheme. So far as all these classes are concerned, the rule established on the principles laid down by the House of Lords as enunciated by Lord Cairns in *Doherty v. Allman* (*p*) applies; that where there are negative covenants the Court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties unless the plaintiff seeking to enforce the covenant has, by his own misconduct, delay, laches or the like, disentitled himself to sue, that is to say, has raised against himself a personal equity" (*q*).

"The fact that the several purchasers were not aware at the date of their common purchase of any such covenants seems to be almost conclusive evidence that the covenants were not entered into for the benefit of the purchasers *inter se*, but for the benefit of the vendor himself" (*r*).

Notice.

Where property is sold under an open contract, and no restrictions appear on the title, the mere fact that the vendor's solicitor proposes to insert restrictive stipulations in the conveyance, which are partly waived and partly insisted on, is not sufficient to affect the purchaser or his solicitor with notice that the property is already subject to restriction (*s*).

"As Sir George Jessel pointed out in *London and South Western Railway Company v. Gomm* (*t*), it is the possession of the legal estate without notice, by a purchaser for value,

(*p*) 3 App. Cas. 709.

(*q*) *Osborne v. Bradley*, (1903) 2 Ch. 446, p. 450, per Farwell, J.

(*r*) *Dart, Vendor and Purchaser*

(6th ed.), p. 455.

(*s*) *Rowell v. Satchell*, (1903) 2 Ch. 212.

(*t*) 20 Ch. Div. 562, p. 583.

that enables him to plead an effectual legal bar to the equitable right to enforce that equitable covenant. When you have once established the absence of the legal estate, the equitable interest, as Sir George Jessel points out, remains unaffected, notice or no notice. This is to some extent material, because I think in *Sayers v. Collyer* (u) the Court of Appeal considered that something less than such acquiescence as would be a bar to all relief at law would enable a Court of Equity to give damages instead of an injunction" (x).

Where, on the sale of the whole of a vendor's land, the purchaser enters into a contract restricting the user of the land, the executor of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death (y).

Such a covenant is merely personal and collateral. "It has not been entered into for the benefit of any land of the vendor or of any land designated in the conveyance: it is a covenant which . . . would not pass to the heirs of the vendor, notwithstanding the words of the covenant are 'covenant with the said R. H. Formby (vendor), his heirs, executors and administrators'" (z).

(u) 28 Ch. Div. 108, p. 110.

(x) *Osborne v. Bradley*, (1903) 2 Ch. 446, p. 451, per Farwell, J.

(y) *Formby v. Barker*, (1903) 2 Ch. A. 539.

(z) *Ib.* p. 552, per Vaughan Williams, L. J.

CHAPTER X.

MISCELLANEOUS COVENANTS.

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Covenants
as to wills.

A COVENANT to devise property only applies to property of which the covenantor is possessed at the date of his death, and does not prevent him from disposing of his property as he chooses during his life (*a*).

But where a father covenanted to leave by his will all his personal estate equally amongst his children, a disposition for the purpose of defeating the covenant was set aside, there being a transfer to one of the children with a reservation of dividends to the father for his life and other evidence of an intention to elude the covenant (*b*).

Where A., upon the marriage of his daughter, B., covenanted with her husband by deed or will to give or

(*a*) Needham *v.* Kirkman, 3 B. Ves. 48.

& Ald. 531; Lewis *v.* Madocks, 17

(*b*) Jones *v.* Martin, 5 Ves. 266, n.

leave to B. one equal eighth share of all the real and personal estate of which he should die possessed, and B. died before A., it was held that the husband had no right of action against A.'s executors, although A. gave all his estate by will to his widow and daughters (c).

In *Re Brookman's Trust* (d) a father covenanted on the marriage of his daughter that if she should survive him, or leave any child, children or issue, he would by will give and devise or otherwise effectually assure to trustees a share equal to that of his other children of the property he should leave at his death upon trusts for the benefit of the husband and wife and children of the marriage. The father did make a will, in accordance with the covenant. One child of the marriage attained twenty-one, but died in the lifetime of the covenantor; but it was held her representative took nothing under the covenant.

Covenantor
need not
guard against
lapse.

Where the donee of a general testamentary power of appointment over a fund borrowed money, and as security for the loan covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund, and that he would not revoke the will, and made a will accordingly, and died, it was held that the lender was not entitled to priority over the appointor's general creditors (e).

"It is settled that, except by making a creditor an executor, a person disposing of his own property by will cannot by his will prefer one creditor to another, or make a gift by will payable before a debt. A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will, and not a preferential debt" (f).

In *Jervis v. Wolferstan* (g), A. covenanted to bequeath

(c) *Jones v. How*, 9 C. B. 1; 7 Hare, 265.

(e) *Beyfus v. Lawley*, (1903) A. C. 411.

(d) L. R. 5 Ch. 182.

(f) *Id.* p. 413, per Lord Lindley.

(g) L. R. 18 Eq. 18.

or otherwise provide that a share of residuary estate should come to the covenantee, B. He did bequeath it by will, and fulfilled the covenant. "The effect of the bequest by will was to make her a residuary legatee, and nothing else, and consequently when the trustees of her settlement received it they were simply in the position of a residuary legatee receiving a share of the residue; and if as residuary legatee B. was liable to refund, the liability in my opinion remains" (*h*). Accordingly the covenantee was held equally liable to refund a share of residuary estate which had been distributed to meet calls made on the testator's estate with the other beneficiaries.

A covenant to bequeath a sum by will is not satisfied by an appointment under a limited power, although expressed to be in discharge of the covenant (*i*).

Sum secured
by a covenant
to leave by
will a debt.

The sum secured by such a covenant is a debt.

In *Re Robson* (*k*), there was a covenant to pay to trustees a sum of £20,000 upon trust for B. for life, with remainder to the settlor for life, with remainder as B. should appoint. B. by will appointed the £20,000, except £2,000, to charities. The settlor survived B., and died without having paid the £20,000; and it was held that, although it would be in part payable out of the proceeds of land, the gift of the residue was not in any part void under the Mortmain Act.

Duty.

A father covenanted to pay to the trustees of his daughter's marriage settlement during his life, or within twelve months after his death, "the sum of £10,000, without any deduction whatsoever," and in the meantime to pay an annuity of £200 per annum. It was held that if duty was payable it must be borne by the fund (*l*).

But where a father, on the marriage of his daughter, covenanted with the trustees of her marriage settlement

(*h*) L. R. 18 Eq. p. 24, per 447.

Jessel, M. R.

(*k*) 19 Ch. Div. 156.

(*i*) *Graham v. Wickham*, 31 Beav.

(*l*) *Re Higgins*, 31 Ch. Div. 142.

that his executors should, within six months after his death, pay the sum of £25,000, "without any deduction," to be held by them upon the trusts of the settlement, and the Crown claimed the payment of settlement estate duty on the death of the covenantor in respect of the £25,000, under sect. 5 of the Finance Act, 1894: it was held that, independently of the words "without any deduction," the settlement estate duty must have been paid out of the £25,000; but that by reason of these words the settlement estate duty must be paid out of the residuary estate (*n*).

Where a testatrix covenanted that a sum of money should be paid to trustees within one month after her death on the trusts of a settlement, and default in payment was made, it was held that the testatrix's estate was liable to pay interest at 5 per cent. (*n*). Interest.

This was followed in *Re Horner* (*o*), where a testator had covenanted that his executors or administrators should pay a sum of £2,000 within six calendar months after his decease.

"Where a man covenants to do an act, and he does that which may be *pro tanto* converted to a completion of the covenant, he shall be deemed to have done it with such intention." Satisfaction.

Thus, where a marriage settlement recited that the intended husband had paid to the trustees a sum of £1,500, and had agreed to pay £500 further at least, and he covenanted to pay the £500 within six months, and it was declared that the sums so paid should be held on trust, that the trustees should, with the husband's consent, invest them in the purchase of freehold estates in Devon, to be held on the trusts thereby declared: the husband did not pay either the £1,500 or the £500, but purchased a fee simple estate in Devon for £2,150, which was conveyed to

(*n*) *Re Maryon-Wilson*, (1900) 1 Ch. A. 565.

(*n*) *Knapp v. Burnaby*, 9 W. R. 765.

(*o*) (1896) 2 Ch. 188.

him, but of which he made no settlement. On the husband's death intestate, the estate was held to be subject to the trusts of the settlement (*p*).

In *Lechmere v. Lechmere* (*q*), £30,000 was covenanted upon marriage to be laid out in land in fee, with the consent of the trustees, to be settled on the husband and wife, with remainder to the sons in tail male, with remainder to the husband, his heirs and assigns. Interest was to be paid, until the purchase of the land, at the rate of £5 per cent. to the persons who were to have the rents of the land when purchased. The husband possessed some real estate at the date of the settlement, and subsequently purchased other fee simple land without the consent of the trustees, and also estates for lives and reversionary estate, and died intestate, without fulfilling his covenant. The fee simple land purchased since the date of the settlement, which descended to the heir, went in satisfaction of the covenant, but not the land previously purchased, or the estates for lives, or reversionary estates, and so much of the £30,000 covenanted to be laid out in land as was not satisfied by land purchased since the date of the settlement descending to the heir went to the heir as land.

Where A. covenanted to convey and settle lands, &c., or a rentcharge issuing thereout to certain uses, and afterwards purchased lands but died without making any settlement of them, it was held that the lands were bound by the covenant, there being a sufficient presumption that such was A.'s intention. But if A. had sold or mortgaged (*r*) the lands, it would have been evidence of a different intention, and would have taken off all evidence of his intention to bind them by the covenant (*s*).

Specific
performance.

And specific performance of a covenant to charge an

(*p*) *Sowden v. Sowden*, 3 P. Wms. 228, n.

(*q*) *Ca. t. Talbot*, 80; 2 W. & T. L. C. 399, 7th ed.

(*r*) But cf. *Ex p. Poole*, 11 Jur. 1005, *post*, p. 215.

(*s*) *Deacon v. Smith*, 3 Atk. 323; cf. *Tooke v. Hastings*, 2 Vern. 97; *Roundell v. Breary*, 2 Vern. 482.

annuity on property to which the covenantor may become entitled on the happening of a future event (*t*), or by a given date (*u*), can be obtained.

Where a man covenants upon his marriage to lay out money in the purchase of land, and to settle the land when purchased in favour of his wife and children, the money is converted into land in favour of the heir, as well as of the wife and children (*x*). Conversion.

If the covenantor has purchased property of a different character—*e.g.*, leasehold, where the covenant was to purchase freehold—this will not be taken to be a performance of the covenant (*y*), or copyholds, where the covenant was to settle land of inheritance without impeachment of waste (*z*); but if there is a general covenant to purchase “lands” there might be satisfaction in such a case (*a*). Different kind of property no satisfaction.

Where lands have been purchased in satisfaction of a covenant, and subsequently mortgaged to a mortgagee who had no notice of the covenant, the equity of redemption may be liable to the covenant (*b*). Mortgage.

Where the purchase was made *bonâ fide*, with an intent to perform the covenant, the lands must be taken at the price paid for them, or, at least, their value at the time (*c*).

A settlor covenanted on his marriage to pay to the trustees of his marriage settlement £2,000 in his lifetime, or within six months after his death, to be held in trust for his wife for life, and after her death for the settlor for life, and after the death of the survivor, for the children of that and a former marriage, as the husband and wife should

(*t*) *Lyde v. Mynn*, 4 Sim. 505; 1 My. & K. 683.

(*u*) *Wellesley v. Wellesley*, 4 My. & Cr. 561.

(*x*) *Lechmere v. Carlisle*, 3 P. Wms. 211; *Barham v. Clarendon*, 10 Hare, 126.

(*y*) *Lechmere v. Lechmere*, Ca. t. Talbot, 80; *Lechmere v. Carlisle*,

3 P. Wms. 211; *Whorwood v. Whorwood*, 1 Ves. 540.

(*z*) *Pinnell v. Hallett*, Amb. 106.

(*a*) *Wilks v. Wilks*, 5 Vin. Abr. 293.

(*b*) *Ex p. Poole*, 1 De G. 581; 11 Jur. 1005.

(*c*) Sug: V. & P. (14th ed.), p. 710; cf. *Wace v. Bickerton*, 3 De G. & Sm. 751.

jointly appoint, and in default of appointment, for the children of both marriages, sons at twenty-one, daughters at twenty-one or marriage. The settlor effected two policies on his life under sect. 10 of the Married Women's Property Act, 1870 (*d*). It was held that the policies were not a satisfaction of the covenant (*e*).

Satisfaction
by intestacy.

Where A., upon his marriage, covenanted to purchase lands of £200 a year, and settle them upon himself for life, and for the jointure of his wife, and to his first and other sons in tail, and purchased lands of that value, but died without having made a settlement of them, it was held that the descent of the lands to the son ought to be deemed a satisfaction of the covenant (*f*).

In *Blandy v. Widmore* (*g*), A. covenanted, on his marriage with B., to leave her £620. The marriage took place, and A. died intestate, but as his wife received more than £620 under the Statute of Distributions, this was held to be a satisfaction of the covenant.

If the distributive share is less than the amount covenanted to be left, it will be a satisfaction *pro tanto* (*h*).

Annuity not
satisfied by
intestacy.

A covenant to pay an annuity, or the interest of a sum of money for life, will not be satisfied by a distributive share devolving on the covenantor's intestacy.

In *Couch v. Stratton* (*i*), A. covenanted in his marriage settlement to pay within three months after his death £6,000 to the trustees in trust if the wife should survive him and there should be no issue (which happened), to pay £1,500 to the wife, and the interest of £4,500 to her for life. The share under the Statute of Distributions was held not to be a satisfaction or performance of the covenant.

(*d*) 33 & 34 Vict. c. 93.

(*e*) *Cartwright v. Cartwright*,
(1903) 2 Ch. 306.

(*f*) *Wilcocks v. Wilcocks*, 2
Vern. 558.

(*g*) 1 P. Wms. 323; cf. *Lee v. D'Aranda*, 1 Ves. 1; *Thacker v. Key*, L. R. 8 Eq. 408.

(*h*) *Garthshore v. Chalie*, 10
Ves. 1.

(*i*) 4 Ves. 391.

And where a husband covenanted in 1843, on his marriage, to leave his wife an annuity of £500 at least by his will, and died intestate, it was held that the widow's share of her husband's personal estate under the Statute of Distributions was not to be taken as a performance of his covenant either wholly or *pro tanto* (k).

Where the husband covenants to pay a sum in his life- Debt due. time, and there is a breach of covenant before his death, so that there is a debt due to the wife, her distributive share will not be a satisfaction of the covenant.

Thus, in *Lang v. Lang* (l), A., a domiciled Englishman, married B. in Mauritius, and by the settlement (in French) it was stipulated that A. should invest £4,000, which he acknowledged to have received from B., and that B. should receive the income for life, with remainder to children, or to A. in default of children, and if A. did not invest the £4,000 in his lifetime, B. should be entitled to take it from his assets. A. died intestate in B.'s lifetime, and it was held that B. was entitled to the £4,000 as well as her distributive share, although A. had never received the £4,000 or invested it; and the case was distinguished from *Blandy v. Widmore* (m) on the ground that there was an obligation on the husband to produce the money.

A gift by will *primâ facie* imports bounty, and, at all events, if they differ in amount, or period of payment, Gifts by will *primâ facie* bounty. gifts by will do not amount to satisfaction of a covenant.

In *Haynes v. Mico* (n), the husband on his marriage gave the trustees a bond to secure £300 to the wife within one month after the husband's decease. By will the husband gave her £500, payable within six months after his decease, together with other legacies. It was held

(k) *Salisbury v. Salisbury*, 6 Buckland, 1 Ves. 1 (cited 3 Atk. Hare, 526; cf. *Wood v. Wood*, 7 420); *Garthshore v. Charlie*, 10 Ves. Beav. 133; *Young v. Young*, 5 1.
I. R. Eq. 615. (m) 1 P. Wms. 323.
(l) 8 Sim. 451; cf. *Oliver v.* (n) 1 Bro. C. C. 129.

that the bequest of the £500 was not a satisfaction for the £300 secured by the bond.

In *Brown v. Dawson* (o), D. had persuaded his wife to join in selling £16 per annum of her jointure, and gave her notes that his executors should pay her that sum during life out of certain land. A gift by will of that exact sum per annum was held to be a satisfaction of the notes.

The circumstance that two documents are contemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum.

By a separation deed dated the 7th September, 1844, the husband covenanted that his executors or administrators should on his decease pay his wife, if she survived him, £100, with a proviso that if £6 was paid per month for six months after his decease the balance only should be paid. By his will, dated the 5th September, 1844 (but alleged to have been executed on the 9th September, 1844), the testator directed: "After all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." The widow was held entitled to both sums (p).

**Voluntary
covenants.**

Where a person without consideration enters into a covenant, if the Court is not required to do any act to make it perfect, it will be enforced against the covenantor and his executors, but not against his creditors (q).

"According to the authorities, I cannot do anything to perfect the liability of the author of the trust. This covenant, however, is already perfect. The covenantor is liable

(o) Prec. Ch. 240.

(p) *Horlock v. Wiggins*, 39 Ch. Div. 142.

(q) *Clough v. Lambert*, 10 Sim. 174.

at law, and the Court is not called upon to do any act to perfect it" (r).

And accordingly, when the trustee refused to sue upon such a covenant, equity assisted the *cestui que trust* by enabling him to sue at law in the name of the trustees, if there was some reason for trying the case at law; otherwise, payment ought to be ordered on the admission of assets of the covenantor (r).

In a post-nuptial settlement made in 1873 there was a recital that previously to the marriage the husband had agreed to make such settlement of his wife's fortune as was thereafter contained. The husband, being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it to possession, covenanted that on the fund falling into possession, he and his wife would assign it to the wife on the usual trusts for the wife, husband and issue of the marriage, the husband's life interest being determinable on bankruptcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. The wife died in 1877, the husband became bankrupt in 1898, and the fund fell into possession in 1899. It was held that the settlement was good against the trustee in bankruptcy, there being no evidence that it was made with intent to defeat creditors, and that the deed constituted a note or memorandum of the ante-nuptial parol agreement within the Statute of Frauds (s).

What is a
voluntary
covenant.

Where a mortgagor, who has absolutely assigned his equity of redemption in mortgaged property, is sued upon the covenant to pay principal and interest contained in the mortgage, he acquires a new right to redeem, and is entitled, upon paying the mortgage money, to a reconveyance to himself, subject to any equity of redemption vested in any other person. And he is so entitled, even if after the assignment of the equity of redemption the assignee has

Mortgage.

(r) *Fletcher v. Fletcher*, 4 Hare, 67, p. 74, per Wigram, V.-C.; cf. *ante*, p. 154.

(s) *Re Holland, Gregg v. Holland*, (1902) 2 Ch. A. 360.

further charged the property, either to the original mortgagee or to some other person (*t*).

Covenant to stand seised.

The rules as to covenants to stand seised are laid down in *Roe v. Tranmarr* (*u*):—

- “ 1. That there must be a deed.
- “ 2. That there be words sufficient to make a covenant.
- “ 3. That the grantor or covenantor must be actually seised at the time of the grant.
- “ 4. That the intent of the grantor must be plain.
- “ 5. That there be a proper consideration to raise the use.”

A covenant to stand seised derives its effect from the Statute of Uses, and operates without transmutation of possession (*x*).

There is no need that a covenant to stand seised should be created by deed indented; a declaration by deed-poll would have the same effect (*y*). But a parol promise will be insufficient (*z*). A *bonâ fide* relationship by blood or marriage was necessary (*a*), and no use arises to those who are strangers to the consideration (*b*). This, as settlements became more complex, led to the disuse of this form, as trustees are not within the consideration. Now that trustees for contingent remainders are no longer needed (*c*), this objection has ceased to apply; but it is improbable that the use of covenants to stand seised will be revived.

In *Roe v. Tranmarr* (*u*), on the principle, *Benigne faciendae sunt interpretationes chartarum*, a deed invalid as a release, because it attempted to convey an estate in fee tail to commence *in futuro*, was held good as a covenant to stand seised.

(*t*) *Kinnaird v. Trollope*, 39 Ch. D. 636.

(*u*) *Willes*, 632; 2 *Wils.* 75.

(*x*) 4 *Cruise's Digest*, 106.

(*y*) *Shep. Touch.* 508.

(*z*) *Page v. Moulton*, 3 *Dyer*, 296a, pl. 22.

(*a*) *Gerrard v. Worsey*, 3 *Dyer*, 374, pl. 16.

(*b*) *Wiseman's Case*, 2 *Rep.* 15a; *Smith v. Risley*, *Cro. Car.* 529; *Whaley v. Tankard*, 2 *Lev.* 52.

(*c*) 8 & 9 *Vict. c.* 106, s. 8.

CHAPTER XI.

VOID COVENANTS.

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A COVENANT may be void through the incapacity of the contracting parties, as when the covenantor is an infant (*a*), or a company, and the contract is *ultra vires* the memorandum of association. Incapacity of contracting parties.

No action can be brought against an infant apprentice on his covenant to serve (*b*), nor can he be sued in equity (*c*).

Thus an application to enforce by injunction a stipulation, in an apprenticeship deed, to enter into no professional engagement during the term without the master's consent, was refused (*d*).

The provisions of such a deed being unreasonable, they cannot be enforced against an infant or its parents, and consequently no action will lie against one who entices the infant away from its employer (*e*).

- (*a*) *Ludford v. Barber*, 1 T. R. 85. Justice (Chitty), p. 183, 29th ed.
 (*d*) *De Francesco v. Barnum*, 43 Ch. D. 165.
 (*b*) *Gylbert v. Fletcher*, Cro. Car. 179.
 (*e*) *De Francesco v. Barnum* (No. 2), 45 Ch. D. 430.
 (*c*) 1 Eq. Ca. Ab. 6; Burn's

But where an infant covenanted under seal, with the consent of his guardian, to pay a reasonable premium if he were taught the business to which he was apprenticed, it was held that the master could recover for the instruction as a necessary without reference to the covenant (*f*).

And where an infant, in consideration of being employed as a milk-carrier, agreed not to compete in business within a radius of five miles for two years after leaving, and left shortly after attaining majority, an injunction was granted to restrain breach of the agreement (*g*).

Impossible.

If the thing covenanted to be done is in the nature of things impossible at the time the contract is made, the covenant is void (*h*), but if the thing is possible, however absurd, the covenant is not void.

Similarly, "all conditions annexed to estates that contain in them matter at the time of making them impossible to be done, are void. And therefore, if one give a grant of land on condition that a man shall go to Rome in three days, or if one give land in tail on condition that the estate shall cease as if the tenant in tail be dead (which is impossible, since there cannot be any person to take the estate tail till the failure of the issue of the tenant in tail), these and such-like conditions are void" (*i*).

Restraint of marriage.

A promise under hand and seal to marry no one except Catherine L., and, in case of so doing, to pay the said Catherine L. £1,000 within three months of such marriage, was adjudged illegal and void as being in restraint of marriage (*k*).

Where a widow gave a bond to pay B. £100 if she married again, and B. gave the widow a bond to pay her executors £100 if she should not marry again, and the

(*f*) *Walter v. Everard*, (1891) 2 Q. B. 369.

(*g*) *Evans v. Ware*, (1892) 3 Ch. 502; cf. *Cornwall v. Hawkins*, 41 L. J. Ch. 435; *Fellows v. Wood*,

59 L. T. Rep. 513.

(*h*) *Shep. Touch.* 164; *Clifford v. Watts*, L. R. 5 C. P. 577.

(*i*) *Shep. Touch.* 133.

(*k*) *Lowe v. Peers*, 4 Burr. 2225.

widow soon after married, her bond was decreed to be delivered up (*l*).

And where a bond was in common form, but it was proved that the agreement was that the obligor should marry such a man or should pay the money due on the bond, the Court relieved against the bond (*m*).

But a covenant to pay a woman a sum of money so long as she continues sole and unmarried is good (*n*), and so is a covenant to give a woman an annuity of £40 until her marriage, and afterwards an annuity of £20 (*o*).

A restriction on the second marriage of either a man or a woman may be good (*p*).

A covenant will not be rendered wholly void if it is divisible, and one alternative is against public policy, while the other is not. Thus, where an unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mortgagee, and covenanted not to revoke the will, and afterwards became bankrupt, obtained her discharge, revoked her will, and made a new will appointing the money to another person; it was held that the covenant not to revoke the will was divisible, and was not wholly void, although in one alternative it was in restraint of marriage, that the contingent liability under the covenant was incapable of proof in bankruptcy, and was not released by the discharge, and that an action lay for damages for breach of the covenant committed after the bankruptcy (*q*).

All contracts or agreements for promoting marriage for reward are void, and have from an early period been relieved against in equity, as "every contract relating to

Marriage
brocage.

(*l*) *Baker v. White*, 2 Vern. 215.

(*o*) *Webb v. Grace*, 2 Ph. 701.

(*m*) *Key v. Bradshaw*, 2 Vern.

(*p*) *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Allen v. Jackson*, 1 Ch. D. 399.

102.

(*n*) *Gibson v. Dickie*, 3 M. & S.

(*q*) *Robinson v. Ommaney*, 23 Ch. Div. 285.

463.

Illegal
contracts.

marriage ought to be free and open" (r), and, being contrary to public policy, are incapable of confirmation (s).

Any contracts which can prevent or impede the due course of justice are invalid, and illegality can be pleaded at law in defence to an action on a deed (t).

In *Fisher v. Bridges* (u), a covenant for payment of money was held void on the ground that the land had been sold to the covenantor for the purpose of being sold by lottery, in contravention of the statute, and the covenant was contained in a deed to secure the payment of part of the purchase-money, and was a creature of the illegal agreement.

"If the matter required to be, or not to be, done by the covenant be for the substance thereof unlawful, then is the covenant void, and doth not bind; and therefore, if one covenant to kill or rob a man, or the like, this covenant is void" (x).

A covenant made for an illegal consideration is void. Thus, where A., who held an office in the gift of B., agreed by deed with C. to resign, and to procure the appointment for him, and C., in consideration thereof, agreed that A. should have half the profits, and the agreement was carried into effect, though B. had no knowledge of it, on A.'s bringing an action of covenant against C. for not paying him half the profits, it was held that the agreement was a fraud upon B., and therefore illegal and void (y).

A bond for the purchase of the office of groom of the stole was relieved against in equity upon the ground of

(r) *Hall v. Potter*, 3 Lev. 411; 416, n.; *Paxton v. Popham*, 9 Keat v. Allen, 2 Vern. 589; Prec. East, 408.
Ch. 267; *Hall v. Thyne*, Show. (u) 3 E. & B. 642.
P. C. 76; *Roberts v. Roberts*, 3 (x) *Shep. Touch.* 163; *Co. Lit.* P. Wms. 66; and cases cited, *ib.* 206b.
p. 74, n.

(s) *Cole v. Gibson*, 1 Ves. 503.

(t) *Collins v. Blantern*, 2 Wils. 319; cf. *Parsons v. Thompson*, 1 341; *Poole v. Harrobin*, 9 East, H. Bl. 322.

public policy, although the office was not within 5 & 6 Ed. 6 (s).

Sect. 1, sub-sect. 1, of the Tithe Act, 1891 (a), which Tithe Act. provides that "any contract made between an occupier and owner of lands after the passing of this Act for the payment of the tithe rent-charge by the occupier shall be void," prohibits not only a contract by the occupier to pay the tithe rent-charge directly to the tithe owner, but also a contract to reimburse the landlord such sums as shall be paid by him for tithe rent-charge (b).

The Windhill Local Board brought an indictment Stifling against stone merchants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made and sanctioned by the judge, and was afterwards confirmed by a deed in which the stone merchants covenanted to restore the road which they had broken up within seven years, and the local board covenanted that when that had been done they would consent to a verdict of not guilty on the indictment. The stone merchants failed to restore the road, and the local board then brought an action on the covenant. It was held that the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. The action was therefore dismissed (c).

Where the secretary of a building society who had made default, and was threatened with a prosecution for embezzlement, applied to his brother-in-law and mother-in-law for assistance, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue, and gave two promissory

(s) *Harrington v. Du Chatel*, 1 Bro. C. C. 125.

(b) *Ludlow v. Pike*, (1904) 1 K. B. A. 531.

(a) 54 & 55 Vict. c. 8.

(c) *Windhill Local Board of Health v. Vint*, 45 Ch. Div. 351.

notes, it was held that it was an implied term of the agreement that there should be no prosecution, that the agreement was for an illegal consideration, and void, and that the promissory notes ought to be set aside (*d*).

In 1897 the defendant, her husband, and the plaintiff were domiciled in France. The plaintiff gave the defendant's husband a sum of money for a specific purpose, but he misappropriated it, and the plaintiff threatened to prosecute him. The defendant agreed to make the amount good by instalments. Such an agreement is not invalid in France. The defendant came to reside in England, and was sued on the agreement, but it was held that it could not be enforced in this country (*e*).

Unlawful by statute.

"Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute" (*f*).

Thus, covenants to favour one creditor more than another (*g*), in contravention of the statutes (*h*) as to sale of offices (*i*), or against simony (*k*), are void.

Gaming and horse-racing.

At common law, gaming and horse-racing contracts appear to have been lawful (*l*), but by various statutes (*m*) this was altered, and by 8 & 9 Vict. c. 109, s. 18, it is enacted "that all contracts or agreements, whether by

(*d*) *Jones v. Merionethshire Building Society*, (1891) 2 Ch. 587.

(*e*) *Kaufman v. Gerson*, (1904) 1 K. B. A. 591.

(*f*) *Bartlett v. Vince*, Carth. 252, per Holt, C. J.

(*g*) *Staines v. Wainwright*, 6 Bing. N. C. 174; *M'Kewan v. Sandersen*, L. R. 20 Eq. 65; *Re Lensberg's Policy*, 7 Ch. D. 650; *Ex p. Barter*, 26 Ch. D. 510.

(*h*) 5 & 6 Ed. 6, c. 16, ss. 2, 3,

4; and 49 Geo. 3, c. 126, s. 4.

(*i*) *Law v. Law*, 3 P. Wms. 391; *Layng v. Paine*, Willes, 571; *Hopkins v. Prescott*, 6 C. B. 578.

(*k*) *Ffytche v. Bishop of London*, 1 East, 487; *Fox v. Bishop of Chester*, 6 Bing. 1.

(*l*) *Sherbon v. Colebach*, 2 Vent. 175.

(*m*) 16 Car. 2, c. 7; and 9 Anne, c. 14; repealed by 8 & 9 Vict. c. 109, s. 15.

parol, or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of which any wager shall have been made."

In *Bubb v. Yelverton* (n), it was held that a bond given to persons to whom the obligor had lost bets on horse-races, which he was unable to pay, to prevent their taking steps respecting him with the Jockey Club, which would have involved the obligor in pecuniary liabilities in the shape of forfeiting stakes and answering actions from persons to whom he had sold horses with their engagements, was good, and could be proved against the obligor's estate, but Lord Romilly declined to express any opinion if a bond given simply to secure a racing debt would be valid.

Money lent to enable the borrower to pay a debt, which he had already lost, did not constitute a debt for "illegal consideration" within 5 & 6 Will. 4, c. 41 (o).

By the Gaming Act, 1892 (p), any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

In *Read v. Anderson* (q), it was held that when a commission agent was employed an implied contract arose for the repayment by the principal to the agent of the sums which the agent had paid upon the order of the principal.

The Gaming Act, 1892, was not retrospective (r).

(n) L. R. 9 Eq. 471.

(q) 13 Q. B. Div. 779.

(o) *Ex p. Pyke*, 8 Ch. D. 754.

(r) *Knight v. Lee*, (1893) 1 Q. B.

(p) 55 & 56 Vict. c. 9, s. 1.

41.

In *Tatam v. Reeve* (s), the plaintiff, at the request of the defendant, paid sums due from the defendant to certain persons upon bets on horse-races, and sued to recover the amount so paid by him. It was held that the plaintiff could not recover.

Where one person advances money to another for the purpose of making bets on horses on their joint account, and the money so advanced was lost on such bets, it was held that the person who advanced the money could not maintain an action against the other for half the amount so lost (t).

In *Thwaites v. Coulthwaite* (u), it was held that there was jurisdiction to entertain an application for an account of profits in the case of the business of a book-maker, and it was held that the business was not necessarily an illegal one; but in ordering an account, power was reserved to deal with any items which might appear to have relation to profits earned by illegal practices.

Restraint of
trade.

"In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel v. Reynolds* (x). That was a case of particular restraint, and the covenant was held good" (y).

"When *Mitchel v. Reynolds* (x) was decided, and for many years afterwards, it was considered that the consideration for covenants in partial restraint of trade must be adequate. This, however, was held in *Hitchcock v.*

(s) (1893) 1 Q. B. 44.

(t) *Saffery v. Mayer*, (1901) 1 Q. B. 11.

(u) (1896) 1 Ch. 496.

(x) 1 P. Wms. 181; 1 Smith,

L. C. (9th ed.), 430.

(y) *Nordenfellt v. Maxim-Nordenfellt Guns and Ammunition Company*, (1894) A. C. 535, p. 541, per Herschell, L. C.

Coker (z) not to be necessary, and the old view on this point has never since been entertained" (a).

As regards space, the old doctrine was that a covenant not to carry on a particular business anywhere in England was invalid. And "the principle on which restraints of trade, partial in point of space, have been supported, has not been applied to restraints general in point of space, but partial in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only" (b).

"Where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good" (c).

In *Whittaker v. Howe* (d), a covenant not to practise as a solicitor in any part of Great Britain for twenty years was enforced by injunction. That case went too far, because the covenant imposed a greater restraint than the protection of the covenantee required (e). In *Allsopp v. Wheatcroft* (f), Wickens, V.-C., held that a covenant by a clerk and traveller with a firm of brewers that he would not during his service, nor within two years afterwards, directly or indirectly sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public company or corporation, of any Burton ale or porter brewed at Burton, or offered for such, other than that brewed by the plaintiffs, was void as unnecessarily extensive.

In a number of cases (g) covenants in restraint of trade

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|---|---|
| (z) 6 A. & E. 438; cf. <i>Tallis v. Tallis</i> , 1 E. & B. 391. | & G. 195. |
| (a) (1893) 1 Ch. p. 647, per Lindley, L. J. | (d) 3 Beav. 383. |
| (b) <i>Hunlocke v. Blacklowe</i> , 2 Wms. Saund. (6th ed.), 156b, n. | (e) <i>Maxim-Nordenfelt Company v. Nordenfelt</i> , (1893) 1 Ch. A. 630, p. 649, per Lindley, L. J. |
| (c) <i>Procter v. Sargent</i> , 2 Man. & G. 33; cf. <i>Ward v. Byrne</i> , 5 M. & W. 548; <i>Hinde v. Gray</i> , 1 Man. | (f) L. R. 15 Eq. 59. |
| | (g) <i>Wallis v. Day</i> , 2 M. & W. 273; <i>Jones v. Lees</i> , 1 H. & N. 189; <i>Leather Cloth Company v.</i> |

have been held valid, although the restraint extended over the whole of England; but in these cases the restraint was not greater than the protection of the covenantee required, and the covenant taken in connection with the business to which it referred could not be said to be injurious to the public interests.

In *Rousillon v. Rousillon* (*h*), Fry, J., came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of James, V.-C., in *Leather Cloth Company v. Lorsont* (*i*).

Of these cases Herschell, L. C., said (*k*):—

“I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid. . . . When Lord Maclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom, and one which was limited to a particular place, the reason which he gave for the distinction was that ‘the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by.’ He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: ‘Thirdly, because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix

Lorsont, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Badische Anilin und Soda Fabrik v. Schott*, (1892) 3 Ch. 447.

(*h*) 14 Ch. D. 351.

(*i*) L. R. 9 Eq. 345.

(*k*) (1894) A. C. pp. 546—548.

a certain loss on one side, without any benefit to the other.' . . . A study of Lord Macclesfield's judgment will show that, if the conditions which prevail at the present day had existed in his time, he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact. Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule, which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law."

A covenant by a patentee and manufacturer of guns and ammunition for purposes of war with a company to whom he sold his business not for twenty-five years to engage either directly or indirectly in the business of a manufacturer of guns or ammunition, was held valid, as not being wider than was necessary for the protection of the company, nor injurious to the public interests of the country (*l*).

A covenant not to exercise any business without the consent of the employer, even if coupled with a proviso that it is not to be withheld except on engaging in a rival business, though reasonable in respect of distance and time, is void (*m*).

(*l*) *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company*, (1894) A. C. 535.

(*m*) *Perls v. Saalfeld*, (1892) 2 Ch. A. 149.

An agreement was made in 1894 between the plaintiff, a hardware manufacturer at Dudley, and the defendant, that the latter would not, during his service, or after the determination thereof, divulge to any person the secrets of the plaintiff, or the mode of conducting his business, or any part thereof; or, after the determination of such service, work for or serve any other person or firm carrying on the same kind of business, or any part thereof, within a radius of twenty-five miles from the plaintiff's works at Dudley. In 1897 the defendant left the plaintiff's service, and in 1899, without his consent, entered the service of a firm carrying on a similar business three miles from the plaintiff's works. It was held that the restrictive clause was not void, either as being unreasonable for the plaintiff's protection, or as being unlimited in point of time (*n*).

An agreement for the employment of the defendant as a traveller provided that he was to "call upon and solicit orders" for all articles in the way of the plaintiff's business of antiseptic manufacturers, and in the event of the determination of the agreement, that he should not, either on his own account or for any employer, "call upon, or directly or indirectly solicit orders from, or in any way deal or transact business" with anyone who had been a customer of the plaintiff while the agreement was in force. After the termination of the agreement the defendant entered the employment of rival manufacturers, and solicited orders from former customers of the plaintiff. It was held that "transact business" ought to be construed as confined to similar business to that of the plaintiff, and that the agreement was valid (*o*).

In *E. Underwood & Son v. Barker* (*p*), hay and straw merchants at Brentford, who traded in the United Kingdom, France, Belgium, and Canada, employed a clerk and fore-

(*n*) *Haynes v. Doman*, (1899) 2 Ch. A. 576.

Ch. A. 13.

(*p*) (1899) 1 Ch. A. 300; *Vaughan*

(*o*) *Mills v. Dunham*, (1891) 1 Williams, L. J., dissented.

man at £1 15s. per week. The clerk covenanted that he would not, for the space of twelve months next after his leaving or being dismissed, carry on the business of a hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of a hay and straw merchant in the United Kingdom, or in France, or in the kingdom of Belgium, or Holland, or in the Dominion of Canada. It was held that the restraint imposed was not unreasonable, at any rate, so far as the United Kingdom was concerned.

A covenant may be severable. In *William Robinson & Co. v. Heuer (q)*, H. agreed to serve the company as confidential clerk for five years, from the 1st January, 1895, the company having the option to renew the engagement for five years more. The company could dismiss H. at any time by three months' notice. H. agreed to devote his whole time and attention to the business of the company during the term, and that he would not, during the engagement, without the consent of the company, engage as principal or servant in any business relating to goods of any description made or sold by the company, or in any other business whatever, upon pain of instant dismissal. H. covenanted, if dismissed, not to be a principal, agent or servant in the business of dealing with the company's wares within 150 miles of W. for three years. H. left in 1898, and became traveller to another firm carrying on the same business. An injunction was granted limited to the first five years.

By an agreement for the employment of the defendant by the plaintiffs in their business of dairymen, the defendant agreed that he would not, during the continuance of his service, or at any time thereafter, serve or solicit, or in any way interfere with any of the customers who should at any time be served by or then belonging to the plaintiffs. It was held that the agreement must be construed as

(q) (1898) 2 Ch. A. 451.

referring only to the business of dairymen, as then carried on by the plaintiffs at a particular locality, and that the agreement was severable, and was good with regard to customers of the plaintiffs who were such while the defendant was in their service (*r*).

Where a traveller employed by a brewer agreed not to be concerned in selling malt liquors or aerated waters within a certain district for two years after the determination of his employment, and the employer never dealt in aerated waters, the agreement was held to be severable, and the traveller was restrained from selling malt liquors, but not from selling aerated waters (*s*).

Mortgages.

Covenants restraining the redemption of mortgaged property are void, for "the Court will not permit a person under the colour of a mortgage to obtain a collateral advantage not belonging or appurtenant to the contract of mortgage" (*t*). But a covenant for the capitalization of interest has been held valid (*u*), and so has an agreement that a commission should be paid in case the instalments (by which the mortgage was to be repaid) were not paid punctually (*x*). And if the bargain is a fair and reasonable one, and the equity of redemption is not thereby fettered, a mortgagee may stipulate for a collateral advantage at the time of the advance. Thus, a mortgage of an hotel to a brewer contained a covenant by the mortgagors that during the continuance of the security they would deal exclusively with the mortgagee for all beer and malt liquors sold on the mortgaged premises. The deed also provided that the loan should be continued for five years. The Court of Appeal decided that the bargain fixing a term within which the mortgage money should not be called in, and that the

(*r*) *Dubowski & Sons v. Goldstein*, (1896) 1 Q. B. A. 478.

(*s*) *Rogers v. Maddocks*, (1892) 3 Ch. A. 346.

(*t*) *Broad v. Selfe*, 11 W. R. 1036, per Lord Romilly, M. R.;

cf. *Jennings v. Ward*, 2 Vern. 520.

(*u*) *Clarkson v. Henderson*, 14 Ch. D. 348.

(*x*) *General Credit and Discount Company v. Glegg*, 22 Ch. D. 549.

mortgagor should agree to purchase his beer only from the mortgagee during the continuance of the mortgage, was perfectly reasonable (y).

In *Santley v. Wilde* (z), Miss Santley, who was intending to open a theatre, mortgaged the lease of the theatre, and by the mortgage she agreed to repay the principal with interest by quarterly instalments extending over five years, and to pay the mortgagee a third of the profits of the theatre during the whole of the remaining term of the lease which had more than nine years to run. The Court construed the contract as meaning that the property should be charged with an obligation to pay the share of profits as well as the mortgage debt. But Lord Macnaghten thinks "the method of the judgment questionable, and the effect subversive of a settled doctrine of equity" (a).

"A mortgagee can contract with a mortgagor that in consideration of an advance of, say £700, he shall be repaid £1,000 at a future time, with interest on the £1,000 in the meantime. In that case the bargain stands, and cannot be disturbed, and for a very good reason—the mortgagor obtained his advance on the footing and faith of the contract" (b).

In *Browne v. Ryan* (c) the mortgagee, who was an auctioneer, stipulated for the right to sell the mortgaged property within twelve months after redemption, whether the mortgagor desired to sell or not. This was held a fetter or clog on the redemption.

A mortgage of a leasehold public-house by a licensed victualler to brewers contained a covenant that the mortgagor should not during the continuance of the term, and whether any money should or should not be owing on the

(y) *Biggs v. Hoddinott*, (1898) 2 Ch. A. 307.

(z) (1899) 2 Ch. A. 474.

(a) *Bradley v. Carritt*, (1903) A. C. 253, p. 255.

(b) *Biggs v. Hoddinott*, (1898) 2 Ch. A. 307, p. 317, per Romer, J., citing *Potter v. Edwards*, 26 L. J. Ch. 468; and *Mainland v. Upjohn*, 41 Ch. D. 126.

(c) (1901), 2 I. R. 653.

security of the mortgage, use or sell in the house any malt liquors except such as should be purchased from the mortgagees. It was held that this covenant was a clog on the equity of redemption, and that on payment of all that was due on the security, the mortgagor was entitled to a reconveyance of the property free from the restriction (d).

In *Bradley v. Carritt* (e), a holder of shares in a tea company mortgaged the shares to secure a loan, and agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through the mortgagee, to pay him the amount of the commission he would have earned if the teas had been sold through him. The mortgage was paid off, and the company changed their broker. It was held that the agreement was not binding.

In *James v. Kerr* (f), a young man in poor circumstances was defendant in a probate action in which he claimed a certain share of real estate. To enable him to conduct his defence he borrowed money from Kerr, a solicitor, to whom he executed a mortgage, whereby he covenanted to employ a particular solicitor, and, if he should be successful in the action, to pay Kerr a bonus of £225. The deed charged James' interest in the real estate with the repayment of present and future advances, and £5 per cent. interest and the £225. Redemption was decreed on payment of the sums actually advanced with interest.

A deed of mortgage and further charge contained a recital that the mortgagees (who were a solicitor and an auctioneer) had taken transfers of certain mortgage debts on the terms that they should be entitled to make the same charges and receive the same remuneration as they

(d) *Noakes v. Rice*, (1902) A. C. 24.

(e) (1903) A. C. 253.

(f) 40 Ch. D. 449.

would have been entitled to make and receive if they had not been mortgagees. The mortgagees were trustees, and the auctioneer made a valuation, and the solicitor prepared the mortgage. The mortgagees entered into possession. The costs of the valuation were not allowed, and Kay, J., held that, as a mortgagee cannot charge his mortgagor with more than his principal, interest and costs, he is not entitled to charge the mortgagor with any sum payable for his, the mortgagee's, own benefit, or contract with the mortgagor for any such payment (*g*).

But solicitor mortgagees are now entitled to charge costs (*h*).

A covenant for the payment of a higher rate of interest in default of punctual payment is relieved against as a penalty (*i*).

But if there is a proviso for the reduction of the rate of interest on punctual payment, strict performance is necessary (*k*).

A covenant that the mortgagee of an advowson shall be entitled to present, in the event of the benefice becoming vacant, would seem to be void, and he will be compelled to present the mortgagor's nominee (*l*).

A covenant to exercise a limited power of appointment only exerciseable by will, by appointing a certain share to a particular object, would seem to be illegal and void, upon the ground that the power is fiduciary to be exercised by will only, so that up to the last moment of his life the donee should have the power of dealing with the fund as he should think it his duty, having regard to the then wants, position, merits and necessities of the objects (*m*).

(*g*) *Field v. Hopkins*, 44 Ch. Div. 524.

(*h*) 58 & 59 Vict. c. 25, s. 2.

(*i*) *Holles v. Wyse*, 2 Vern. 289; *Strode v. Parker*, 2 Vern. 316.

(*k*) *Nicholls v. Maynard*, 3 Atk. 512; cf. *Thompson v. Hudson*, L. R. 4 H. L. 15.

(*l*) *Mackenzie v. Robinson*, 3 Atk. 559; *Terry v. Cox*, Prec. Ch. 71; 2 Vern. 401, n.; *Amhurst v. Dowling*, 2 Vern. 400.

(*m*) *Thacker v. Key*, L. R. 8 Eq. 814; *Re Bradshaw*, (1902) 1 Ch. 436.

Limited
power.

But an appointment made in satisfaction of such a covenant is valid (n).

General
power.

An appointment made under a general testamentary power, coupled with a covenant not to revoke the will, is not a fraudulent exercise of the power (o).

A wife covenanted to settle all after-acquired property, and that any power of appointment of which she might be a donee should, if executed by her, be executed only in favour of the trustees of her settlement. During the coverture she became a donee of a general testamentary power, which she exercised in favour of persons other than the trustees. It was held that the covenant could not be specifically enforced, but that the trustees were entitled to recover by way of damages from the wife's executors, to the extent of her assets, the value of the property which would have come to the hands of the trustees if the appointment actually made had been in their favour, and that the appointed fund was assets for the payment of her debts (p).

Perpetuity.

A covenant, the effect of which would be to create an executory interest in land to arise in a future event, which may not arise within the limits of the rule against perpetuities, is void, though it be limited to an ascertained person, who can release it at any time.

In *London & South Western Railway Co. v. Gomm* (q), a railway company by deed in 1865 conveyed land to A. in fee, as superfluous land, and A. covenanted with the company that he, his heirs or assigns, would at any time thereafter, whenever the land might be required for the railway or works of the company, and whenever thereunto requested by the company, upon receiving £100, reconvey the land to the company. B., in 1879, purchased the land from

(n) *Bulsteel v. Plummer*, L. R. 6 Ch. 160; *Coffin v. Cooper*, 2 Dr. & Sm. 365; *Palmer v. Locke*, 15 Ch. D. 294.

(o) *Robinson v. Ommaney*, 23 Ch. Div. 285.

(p) *Re Parkin*, (1892) 3 Ch. 510.

(q) 20 Ch. Div. 562.

A.'s heir without notice of the covenant, and the railway company, in 1880, gave B. notice to reconvey the land, and upon his refusal brought an action for specific performance of the covenant. It was held that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid; and also that the railway company could only sell superfluous land outright under the Lands Clauses Consolidation Act, 1845 (*r*), and that a sale reserving an interest to the company was *ultra vires* and void.

Where a railway company sold to a purchaser for a lump sum a plot of land not required by them for the purposes of their undertaking, and the conveyance contained a covenant by the purchaser to resell a certain defined portion to the railway company whenever required so to do, it was held that although such covenant vitiated the sale of the portion of land to which it relates, it did not affect the validity of the sale of the other portion (*s*).

A covenant by the husband in a separation deed to part with the control of his children was formerly void (*t*), but is now allowed by statute (*u*).

A proviso that the covenants in a separation deed shall be void if a petition be filed for divorce for acts committed before or subsequent to the date of the deed is severable, and valid as to acts before the date of the deed (*x*). Separation
deeds.

Where a *quasi* separation deed was executed between a man and a woman who had been living in concubinage, by which they mutually covenanted that they would in future live separately, and he covenanted to pay her an annuity during her life, it was held that the obligation to pay the annuity did not cease by implication on the parties subsequently resuming cohabitation (*y*).

(*r*) 8 & 9 Vict. c. 18, s. 127.

(*s*) *Ray v. Walker*, (1892) 2 Q. B. 88.

(*t*) *Vansittart v. Vansittart*, 4 K. & J. 62; 2 De G. & J. 269.

(*u*) 36 Vict. c. 12, s. 2.

(*x*) *Brunton v. Dixon*, W. N. (1892) p. 105.

(*y*) *Re Abdy, Rabbeth v. Donaldson*, (1895) 1 Ch. A. 455.

In this case, if there had been a proviso that the annuity should cease in the event of the parties resuming cohabitation, it would have been void (z).

"While the husband and wife are living together the wife is entitled to maintenance from the husband, and as that relation is about to terminate the subsistence of the wife is to be guaranteed by the husband giving her an annuity or other provision." This mere statement shows why it is, that when in such a case the parties come together again, the deed is to be at an end, because what it does is to provide a maintenance for the wife, and therefore the Court can insert the words "during the period of separation" (a).

Dependent
covenants.

If the principal thing to be performed, as the conveying of an estate, or the granting of a lease, be void, further covenants which are relative and dependent thereon are so likewise; as if a lease is void for uncertainty, although a separate bond be given for the performance of the covenants contained therein, both bond and covenant, though several deeds, are one assurance, and, the grant being void, are so likewise (b).

Thus, a covenant for payment of rent in a lease cannot be enforced if no estate passed thereby; "if the lease be void as to pass an interest in the land, it is but just that it should be void as to the reservation of rent (c); and if a conveyance of lands is void so as no estate passes, all dependent covenants are void; otherwise of independent covenants" (d).

Where a tenant in tail male demised for ninety-nine years, and his tenant assigned over, but the tenant in tail died without issue male before such assignment, no action

(z) *Ex p. Naden*, L. R. 9 Ch. 1418; 2 Stra. 705.
670.

(a) (1895) 1 Ch. A. 460, per Halsbury, L. C. (d) *Northcote v. Underhill*, 1 Salk. 198; cf. *Cutler v. Bower*, 11 Q. B. 973; *Pitman v. Woodbury*,

(b) *Bac. Abr. Cov. (G.)*. 3 Exch. 4; *Soprani v. Spurro*,

(c) *Frontin v. Small*, 2 Raym. Yelv. 18.

could be maintained against the representative of the grantor by such assignee, the lease being void at such assignment, and no interest passing under it (e).

But where the deed in which the covenants are contained, or the estate on which they depend, though originally good, becomes void owing to subsequent events, breaches of covenant prior to the happening of such events are not discharged (f). Prior liability not discharged.

Thus, if a lease be surrendered or forfeited, liability for prior breaches continues (g), even though under the proviso for re-entry the lessor is to have the premises again, "as if the indenture had never been made."

The plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the master a premium of £25. The master duly instructed the apprentice for a year, and died. The plaintiff sought, in an action against the master's executrix for money had and received, to recover the whole, or some part of the premium, on the ground of failure of consideration. It was held that the action was not maintainable, as the failure was only partial (h). Apprenticeship deed.

But where covenants are independent, a covenantor cannot discharge himself by showing that no estate passed. Or liability on independent covenants.

In a deed of grant of an annuity out of his benefice by a rector, which was void by 13 Eliz. c. 20, the grantor also covenanted personally to pay the rent-charge or annuity, and gave a warrant of attorney to confess judgment as a collateral security. The Court refused to order the deeds to be delivered up to be cancelled (i).

A distinct covenant in a lease whereby the tenant bound himself to pay the property tax and all other taxes imposed on the premises, or on the landlord in respect thereof,

(e) *Andrew v. Pearce*, 1 N. R. 158. (h) *Whincup v. Hughes*, L. R. 6 C. P. 78.

(f) *Shep. Touch.* 18.

(g) *Hartshorne v. Watson*, 4 Bing. N. C. 178; 5 Scott, 500. (i) *Mouys v. Leake*, 8 T. R. 411; cf. *Kerrison v. Mann*, 8 East, 232.

though void and illegal by 46 Geo. 3, c. 65, s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes (*k*).

Bills of Sale
Act, 1882.

Where a bill of sale contains a covenant to pay, and an assignment of personal chattels, and of no other property, and is bad under the statute (*l*) as an assignment, the covenant to pay is also avoided by sect. 9 (*m*).

In *Thomas v. Kelly* (*n*), a bill of sale assigned the goods specifically described in the schedule, and went on to assign "all other chattels and things, the property of the mortgagor, now in or about the premises, and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor." It was held that the bill of sale was void, as going beyond the legal effect of the form of bill of sale given in the Act.

A covenant not to obtain credit elsewhere during the continuance of the security, to give the mortgagees the greater portion of the grantor's business, keep proper books of account, and allow the mortgagees to inspect them, was held to be a deviation from the statutory form invalidating the bill of sale (*o*).

Where what purported to be a hire agreement was found to be a bill of sale and void, it was held that a guarantee by other persons of the due performance of the agreement could not be enforced (*p*).

Where personal chattels and other property were mortgaged by a deed not made in accordance with the statutory form of a bill of sale, and therefore void as regards personal chattels, it was held that it being possible to sever the security upon the personal chattels from that upon the

(*k*) *Gaskell v. King*, 11 East, 165.

(*l*) 45 & 46 Vict. c. 43.

(*m*) *Davis v. Rees*, 17 Q. B. Div.
408.

(*n*) 13 App. Cas. 506.

(*o*) *Peace v. Brookes*, (1895) 2
Q. B. 451.

(*p*) *Brown v. Blaine*, 1 Times
Rep. 158.

other property, the deed remained valid as to the other property, although void as to the personal chattels (q).

Where by one and the same deed the owner of a piano assigned, by way of security for money, the piano, and also the benefit of a hire and purchase agreement into which he had entered respecting it, it was held that the assignment of the agreement was severable from that of the piano, and that, consequently, the deed was not void *in toto* under the Bills of Sale Acts for non-registration, or because it was not in the statutory form (r).

(q) *Re Burdett*, 20 Q. B. Div.
310.

(r) *Re Isaacson*, (1895) 1 Q. B. A.
333.

CHAPTER XII.

DISCHARGE AND SUSPENSION OF COVENANTS.

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By Act of God.

Act of God. “WHERE a covenant is become impossible to be done by the act of God, as where one doth covenant to serve another seven years, and dies before the seven years is expired, the covenant is discharged” (a).

Where party
himself
creates duty.

But there is a distinction between a case where the law creates a duty, when the fact that it has become impossible to perform it serves as a sufficient excuse, and one where a man has created a duty by his own contract. “The rule laid down in *Paradine v. Jane* (b) has been often recognized in Courts of law as a sound one, i.e., that where the party by his own contract creates a duty a charge upon himself, he is bound to make it good if he may, notwithstand-

(a) Shep. Touch. 180.

(b) Alleyn, 27.

ing any accident by inevitable necessity, because he might have provided against it by his contract" (c).

Where A. covenanted to send a ship alongside at a foreign port, it was held that he was not excused from performance of his covenant by the fact that, owing to the prevalence of an infectious disease, all intercourse with the port was prohibited (d).

And where a man covenanted to go to a port in South Carolina, after discharging his cargo at Madeira, he was liable, though prevented from fulfilling his contract by contrary winds and bad weather (e).

"The act of God is in some cases said to excuse the breach of a contract. This is in part an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done or undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham v. Barry* (f), a man might by apt words bind himself that it shall rain to-morrow, or that he will pay damages" (g).

Incapacity, by reason of the intervention of the act of God, to perform personal service is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms, because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service as one of the conditions of the contract. A plea that the apprentice was prevented by the act of God—namely, by permanent illness happening after the making of the indenture—from remaining with or serving the plaintiff during all the term was good in answer to an action on the covenant without any aver-

(c) *Atkinson v. Ritchie*, 10 East, p. 533, per Lord Ellenborough, C. J.

(d) *Barker v. Hodgson*, 3 M. & S. 267.

(e) *Shubrick v. Salmond*, 3 Burr. 1637.

(f) 15 C. B. at p. 619.

(g) *Baily v. De Crespigny*, L. R. 4 Q. B. 180, p. 185, per Hannen, J.

ment that the plaintiff had notice of the illness before the commencement of the action (*h*).

By Act of Law.—(1) By Common Law.

By common law.

Where the deed itself wherein the covenants are contained, or the estate on which the covenants as accessory to the principal do depend, is gone and determined, there regularly the covenants are gone also (*i*).

Thus, to an action of covenant brought upon a lease for breach of a covenant to repair, it was a good defence to plead that the lessor was only tenant for life, that he was dead, and that the lease had thereby determined (*k*).

Merger.

In *Webb v. Russell* (*l*), a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee by which her former reversionary interest was merged. It was held that the covenants incident to that reversionary interest were extinguished.

"It appears that the person entitled to the reversion of the ninety-nine years' term, expectant on the determination of the eleven years' term created by the lease, afterwards acquired in her own person the absolute inheritance in the land, in consequence of which the reversion attendant on the lease granted to the tenant no longer existed. Another estate totally different arose by the extinguishment of the intervening estate" (*m*).

Where L. demised to B. for twenty-one years from June, 1814, and B. demised to M. for twenty-one years from June, 1814, wanting twenty-one days, and then by deed poll, endorsed on the counterpart of the lease to M., granted his estate in the premises to L. to hold to him for all such

(*h*) *Boast v. Firth*, L. R. 4 C. P. 1.

(*i*) *Shep. Touch.* 181; cf. *ante*, p. 240.

(*k*) *Brudnell v. Roberts*, 2 Wils. 143.

(*l*) 3 T. R. 393.

(*m*) *Ib.* p. 402, per Kenyon, C. J.

time or term in the counterpart of the lease mentioned, it was held that B. had not assigned the outstanding term of twenty-one days, and that the reversion was not merged ⁽ⁿ⁾.

In *Thorn v. Woolcombe* (o), a lease was granted in 1759 for ninety-nine years. In 1818 the lessees demised to P. for sixty-two years, if their interest should so long continue, at a rent of £42, and subject to various covenants, with a proviso for re-entry in case of default. P. was already entitled to the reversion in fee, subject to a mortgage. In 1820 P. and his mortgagee conveyed to a purchaser, to whom the mortgagee also assigned his term, and it was agreed that the purchaser should retain £300 of the purchase-money upon trust, if P. should pay the rent and perform the covenants in the lease of 1818, to pay to him the £300 at the expiration or extinguishment of the lease of 1759, and interest in the meantime. It was held that the deed of 1818 was an assignment of all the interest in the lease to P., and that by the conveyance in 1820 that interest as well as the reversion in fee passed to the purchaser, the mortgage being at the same time put an end to. The term, therefore, became merged in the inheritance, and as soon as the term became vested in the purchaser, P. was discharged from the rents and covenants and entitled to the £300.

By 8 & 9 Vict. c. 106, s. 9, it was enacted that “when the reversion expectant on a lease made either before or after the passing of this Act of any tenements or hereditaments of any tenure shall, after the 1st October, 1845, be surrendered or merged, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements and hereditaments shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion on the same lease.”

(n) *Burton v. Barclay*, 5 M. & P. 785.

(o) 3 B. & Ad. 586.

(2) *By Act of Parliament.*

By statute.

"Where A. covenants not to do any act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant" (*p*).

Lands Clauses Act.

Thus, where A., in 1840, demised certain premises to B. for a long term of years, and covenanted that neither he nor his assigns would during the term build upon a paddock fronting the demised premises, and the paddock was subsequently taken by a railway company in exercise of its compulsory powers, and the company built a station thereon, it was held that A. was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant (*q*).

Where, by an Inclosure Act, building on certain land was restrained, and the land was subsequently purchased by a railway company, who sold part as superfluous land, the provisions of the Inclosure Act were held to apply to the part so sold (*r*).

On this principle, a restrictive covenant respecting land purchased by a railway company revives on the sale of the land as superfluous land.

A railway company agreed to let to E. for building purposes land acquired under its compulsory powers; the land had formerly belonged to a building society, which had sold it in lots, each purchaser entering into restrictive covenants for the benefit of the owners of the other lots. E. agreed to sell his interest to R., who knew of the restrictive covenants, but thought that they were extinguished by the purchase by the railway company. It was held

(*p*) *Bac. Abr. Cov.* (G).(*r*) *Bird v. Eggleton*, 29 Ch. D.(*q*) *Baily v. De Crespigny*, L. R. 1012.

6 Q. B. 180.

that the existence of the covenants was a good answer to an action for specific performance or damages (*s*).

Land sold for the purpose of satisfying charges for street improvement under the Public Health Act, 1875 (*t*), cannot be sold free from restrictive covenants binding the land (*u*).

If A. covenants to do a thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the covenant is repealed (*x*).

If a man covenants to do a thing that is declared by statute to be illegal, and the statute is subsequently repealed, that will not make the covenant good, as it was void *ab initio* (*y*).

Land was demised to trustees for the parish of Rugeley, they covenanting to build a workhouse thereon, and to use and occupy the premises for the sole use, maintenance, and support of the poor of Rugeley, and not to convert the building or land to any other use, with a proviso for re-entry on breach of the covenant. The house was built, and used with the land in accordance with the covenant. Then 4 & 5 Will. 4, c. 76, passed, and the parish of Rugeley was incorporated in a union, and the paupers were removed to the union workhouse. The workhouse of Rugeley was uninhabited, and the land was let at a rack rent, which was applied in relief of the rates. On ejectment brought, it was held that there was no breach of the covenant. But even if the condition had not been performed, the non-performance would be excused, as being by act of law, and involuntary on the part of the lessees (*z*).

By a deed dated May 7, 1873, some land in Harrogate was conveyed to Watson in fee, and by the same deed Watson entered into a restrictive covenant as to the use of

(*s*) *Ellis v. Rogers*, 29 Ch. Div. 661.

(*t*) 38 & 39 Vict. c. 55, ss. 150, 257.

(*u*) *Guardians of Tendring Union v. Dowton*, (1891) 3 Ch. A. 265.

(*x*) *Bac. Abr. Cov. (G)*, *Brewster v. Kidgill*, 12 Mod. 166.

(*y*) *Jaques v. Withy*, 1 H. Bl. 65.

(*z*) *Doe d. Marquis of Anglesea v. Churchwardens and Overseers of Rugeley*, 6 Q. B. 107.

the land. Watson devised to trustees upon trust for sale, and died in 1883. In 1889 the trustees conveyed the land, subject to restrictive covenants, to Fox, who, in 1894, by voluntary agreement, conveyed to a school board, who commenced building a school, an infringement of the covenant. It was held that an action for injunction or damages was out of the question, and their only remedy was compensation under sect. 68 of the Lands Clauses Act, 1845 (*a*). The rights of the school board against a person who could be compelled to sell to them, but who was willing to do so, not being less than they would have been if he had been unwilling to sell, but had been compelled to do so (*b*).

Bankruptcy
Act, 1883.

By the Bankruptcy Act, 1883 (*c*), on disclaimer of a lease by the trustee in bankruptcy, the rights and liability of the bankrupt in respect of the property disclaimed is discharged, and, except in cases of fraud or breach of trust, the bankrupt, on obtaining his discharge, is discharged from liability on a covenant (*d*).

Statute of
Limitations.

The limitation of twelve years imposed by the Real Property Limitation Act, 1874 (*e*), to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land (*f*), even when the debt is secured by a collateral bond (*g*).

Payment of interest by the mortgagor prevents the Act from running in favour of a surety, although it is doubtful if the section applies to a personal action unless brought against the mortgagor or his representatives (*h*).

A testator covenanted for the payment of £4,000 after his death, to be held upon trusts under which his son was

(*a*) 8 & 9 Vict. c. 18.

(*b*) Kirby v. School Board for Harrogate, (1896) 1 Ch. A. 437.

(*c*) 46 & 47 Vict. c. 52, *ante*, pp. 148, 149.

(*d*) *Ib.* s. 30.

(*e*) 37 & 38 Vict. c. 57, s. 8.

(*f*) Sutton v. Sutton, 22 Ch. Div. 511.

(*g*) Fearnside v. Flint, 22 Ch. D. 579.

(*h*) *Re* Frisby, 43 Ch. Div. 106; *cf. Re* Powers, 30 Ch. Div. 291.

tenant for life, and charged the same on certain land. By his will he devised the land charged with the £4,000 to his son in fee. The testator died in 1871, but the £4,000 was never raised, nor was any interest paid, but the son received the profits. Owing to the depreciation in the value of land, it was doubtful if it would realize £4,000, and in 1895 the trustee took out a summons to decide whether the remedy under the covenant against the residuary personal estate of the testator was barred by the Real Property Limitation Act, 1874 (*i*). It was not disputed that the charge was subsisting against the land. It was held not to be the son's duty to pay interest, and that no presumption of payment of interest by him could be made, and that the claim on the covenant was barred (*j*).

Payment of interest by the tenant for life of a settled equity of redemption is sufficient to keep alive the right of action on the covenant of the settlor within 3 & 4 Will. 4, c. 42, s. 5 (*k*).

Where a mortgagor applied by summons as against a mortgagee that a fund in Court in an administration action, being the proceeds of sale of the mortgaged property, real and personal estate under a will might be paid out to him after paying the mortgagee's principal and six years' interest, it was held that the mortgagee was entitled to all arrears of interest, and that sect. 42 of 3 & 4 Will. 4, c. 27, did not apply (*l*).

A mortgagor seeking to redeem can only do so on paying all arrears of interest from the date of the mortgage (*m*).

Where foreclosure proceedings are taken by the mortgagee, he cannot recover more than six years' arrears of interest (*n*).

(*i*) 37 & 38 Vict. c. 57, s. 8.

(*j*) *Re England*, (1895) 2 Ch. A. 820.

(*k*) *Dibb v. Walker*, (1893) 2 Ch. 429.

(*l*) *Re Lloyd*, (1903) 1 Ch. A. 385.

(*m*) *Dingle v. Coppen*, (1899) 1 Ch. 726; *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Re Marshfield*, 34 Ch. D. 721.

(*n*) *Shaw v. Johnson*, 1 Dr. & Sm. 412; *Round v. Bell*, 30 Beav. 121.

Reversionary
interest.

A testatrix died, having devised her real estate to trustees in trust for A. for life, and after A.'s death, in trust to sell and divide among her nephews and nieces. The nephews and nieces joined in mortgaging their reversionary interest in 1881, and the deed contained a joint and several covenant to pay. The last payment of interest was made on the 18th October, 1882, and on the 7th October, 1902, the plaintiff brought an action for the recovery of the principal and interest. A. was still living. It was held by Wright, J., that the money payable under the covenant was money charged on land within sect. 8 of the Real Property Limitation Act, 1874, and that the limitation of twelve years applied, although the subject-matter of the mortgage was a reversion (*o*).

But time runs for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession (*p*).

By Act of Parties.

Release.

A covenant may be released by the covenantee, but, at common law, such release must be by deed (*q*).

Thus, a covenant for payment of a sum certain was not capable of being discharged by parol or accord and satisfaction before breach (*r*), but, after breach, claims sounding in damages could be the subject of accord and satisfaction (*s*).

It was at one time held, that if one covenanted with another to do a certain act in consideration of reward, and the other prevented the stipulated thing from being literally

(*o*) *Kirkland v. Peatfield*, (1903)

1 K. B. 757.

(*p*) *Hugill v. Wilkinson*, 38 Ch. D. 480; cf. *Wheeler v. Howell*, 3 K. & J. 198; *Jordan v. Young*, W. N. (1878) 229; *contra*, *Vincent v. Goring*, 1 J. & Lat. 697; *Sinclair v. Jackson*, 17 Beav. 405; *Smith v.*

Hill, 9 Ch. D. 143.

(*q*) *Shep. Touch*, 181; *White v. Parkin*, 12 East, 583.

(*r*) *Spence v. Healy*, 8 Exch. 668; *Mayor of Berwick v. Oswald*, 1 E. & B. 295.

(*s*) *Blake's Case*, 6 Rep. 44; Bac. Abr. "Accord," B.

performed, and accepted an equivalent, he might be sued for the reward, and the reason for the non-compliance with the literal terms averred (*t*).

But the better opinion seems to be that in such a case an action for covenant did not lie, but that where the cove-
nantee agreed to accept another thing in satisfaction of his
damages, this was an answer to an action for the non-per-
formance of the thing stipulated (*u*).

Where there was a covenant by A. to convey land to B. on or before a certain day by such conveyance as B.'s counsel should advise, in consideration of which B. cove-
nanted to pay a certain sum and reserve certain rents to A., and to lay out a certain sum on the premises, it was held that A. could not maintain covenant by showing that after the day B. accepted a conveyance of ground rents in lieu of part of the land, and accepted the conveyance of that and the conveyance of the other part in lieu of the conveyance covenanted to be made by A., as being a substitution of a different agreement by parol, to which the covenant did not apply (*x*). Parcel agree-
ment.

Where A. covenanted that his ship would receive from the freighter's agent at Gibraltar, Malaga, Seville or Cadiz, as should be ordered by the freighter's agent at Gibraltar, a homeward cargo, and therewith sail direct to London, and there make delivery of it, and the freighter covenanted to pay £550 for the freight out and home, and A., in pursuance of directions from the freighter's agent at Gibraltar, sailed to Cadiz for a cargo, the freighter's agent at Cadiz directed him to go to Seville for a cargo, the freighter's agent at Seville loaded a homeward cargo and directed A. to proceed to Liverpool, where A. delivered and the freighter received the cargo; it was held that A. could not in an action of covenant on the charter-party averring the Literal per-
formance
necessary
at law.

(*t*) *Hotham v. East India Com-pany*, 1 Doug. 272. 619; *Thompson v. Brown*, 7 Taunt. 656, p. 674.

(*u*) *Heard v. Wadham*, 1 East, 619. (*x*) *Heard v. Wadham*, 1 East, 619.

substituted voyage recover the freight covenanted to be paid on the delivery in London (*y*).

A lessee of a farm covenanted with his lessor to bring all such materials as should at any time during the term be wanted in the erection of a threshing mill which the lessor covenanted to erect during the term for the use of the lessee and the occupiers of an adjoining farm. A request by the lessee that the lessor should refrain from erecting the mill until requested by him was no defence to an action on the covenant (*z*).

The plaintiff covenanted to build two houses by a certain day for £500, and averred in an action of covenant for the money that the houses were built in the time. Evidence that the time had been enlarged by parol agreement, and that the houses were built within the time so enlarged would not support an action on the covenant (*a*).

Relief in equity.

But in cases of mistake, accident or surprise, or where the conduct of the covenantee had conduced to the mistake, equity would grant relief.

Thus, where a lessor gave his lessee notice to repair, and the lessee offered to sell his interest in the premises, on which negotiations took place, it was held that the effect of the offer and the negotiation was to suspend the notice till the negotiation had been terminated. A Court of Equity would, and therefore, since the Judicature Act, a Court of Law will relieve in such a case against a forfeiture founded on the original notice (*b*).

Separation deed.

A covenant to pay an annuity in a separation deed would cease to be payable on the resumption of cohabitation (*c*).

(*y*) *Thompson v. Brown*, 7 Taunt. 656.

(*z*) *Cordwent v. Hunt*, 3 Taunt. 596.

(*a*) *Little v. Holland*, 3 T. R. 590; cf. *Husband v. Davis*, 10 C. B. 645. See also, since the Judicature

Act.

(*b*) *Hughes v. Metropolitan Railway Company*, 1 C. P. Div. 120; 2 App. Cas. 439; cf. *Bargent v. Thompson*, 4 Giff. 473.

(*c*) *Nicol v. Nicol*, 31 Ch. Div. 524.

But the fact that acts of connubial intercourse have taken place is not of itself conclusive evidence that the separation has come to an end, so as to make a covenant in a separation deed to pay the wife a weekly sum during their joint lives if they should so long live separate from one another of no effect (*d*).

Adultery by the wife is no answer to an action for arrears of an annuity due under a separation deed (*e*).

Where by a separation deed property was assigned upon trusts for the wife for life, and after her death for the benefit of the existing children of the marriage, and the husband and wife, after separating, subsequently resumed cohabitation, it was held that the settlement in favour of the children was not affected (*f*).

But if no separation took place the decision would be different, and the deed cancelled (*g*).

A covenantor may be discharged by the obtaining of a judgment against a joint covenantor.

Judgment
against a
joint cove-
nantor.

“The case of *King v. Hoare* (*h*) appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If, then, there are three persons so liable, and the creditor sues two of them, and these two make no objection, the creditor may recover judgment against these two. But should he afterwards bring a further action against the third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is that of the third, and not of the other two. Nor is it any answer to say to him that whatever he pays on the judgment against himself he may

(*d*) *Rowell v. Rowell*, (1900) 1 Q. B. A. 9.

(*e*) *Jee v. Thurlow*, 2 B. & C. 547; *Fearon v. Earl of Aylesford*, 14 Q. B. Div. 792, p. 799; *Sweet v. Sweet*, (1895) 1 Q. B. 12.

(*f*) *Re Spark's Trusts*, (1904) 1 Ch. 451; cf. *Ruffles v. Alston*, L. R. 19 Eq. 539.

(*g*) *Bindley v. Mulloney*, L. R. 7 Eq. 343.

(*h*) 13 M. & W. 494.

have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, where the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action: this is equivalent to saying that he has disabled himself from suing the third in the way that the third has a right to be sued" (i).

In *Pilley v. Robinson* (k), the Divisional Court held that one co-contractor who is sued is entitled as of right to have his co-contractors joined as defendants. A similar point came before the Court of Appeal in *Wilson, Sons & Co. v. Balcarres Brook Steamship Company* (l), in which it was held that where one co-contractor was out of the jurisdiction it was not necessary to the continuance of the action that he should be joined as defendant.

In *Robinson v. Geisel* (m), it was held that where an action is brought against several joint contractors, all of whom are within the jurisdiction, the action will not be stayed on the ground that one of the defendants has not been served, if it appears that the plaintiff has done everything in his power to effect service.

Release of
all claims.

A covenant that has not been broken, or a covenant that is future and contingent, will not be discharged by a release of all claims or demands: "therefore, if the lessee of a house covenant to leave it as well in the end of his term as it was in the beginning, and before the end of the term the lessor releases to the lessee all demands, this release is no bar to an action for subsequent breach of the covenant" (n).

(i) *Kendall v. Hamilton*, 4 App. Cas. 504, pp. 515, 516, per Lord Cairns, L. C.

(k) 20 Q. B. D. 155.

(l) (1893) 1 Q. B. A. 422.

(m) (1894) 2 Q. B. A. 685.

(n) *Shep. Touch.* 344; *Co. Lit.* 292 b.

But by a release of all covenants those already broken, and all then existing which may be afterwards broken, are discharged (*o*).

A covenant is not discharged because work undertaken in breach of it is of great public importance, nor will equity refuse to restrain the breach of such a covenant on this ground (*p*). Not discharged because breach a public benefit.

And it will be no defence to an application to restrain breaches of covenant to say that the covenantee sustains no damage; for, if the covenantor benefits by the breach, the covenantee may reasonably demand a share as the price of his consent (*q*). Nor because breach does not damage covenantee.

(*o*) Shep. Touch. 342.

L. J. Ch. 401, per Turner, L. J.

(*p*) Lloyd v. London, Chatham and Dover Railway Company, 34

(*q*) Wells v. Attenborough, 19 W. R. 405.

APPENDIX.

ACTION OF COVENANT.

"A writ of covenant ought not to be made according to law merchant without a deed, because no plea of covenant can be made without deed, and every man ought to be judged according to his deed and not by another law; and the form of the writ is such: 'The king to the sheriff, &c., command A, that, &c., he keep his covenant with B, &c., touching the damage and loss by the breach of trust and default of W, the son of R, the apprentice of the aforesaid B, committed within the term of six years, to be restored to him, the said B, and unless, &c.'"^(a)

Writ of covenant.

"If A for valuable consideration promise by his deed not to do a certain thing, no action upon the case lies upon this promise, but a writ of covenant"^(b).

Where action of covenant proper remedy.

"So if A recovers a debt against B, and B pays him the condemnation, upon which A releases all actions, executions, &c., to B by deed, and by the same deed promises that he will withdraw and discharge all writs of execution against B upon the said judgment, yet no action upon the case lies upon this promise; because it is made by deed, and so he ought to have a writ of covenant"^(c).

For the form of an action of covenant see *Thursby v. Plant*^(d).

Form of action.

In the *declaration* long recitals of a deed were avoided, as being liable to variance and formal objections; thus, where plaintiff declared in covenant that defendant demised to him

(a) Fitz. N. B. 145.

(c) Bac. Abr. Cov. C.; Rol. Abr.

(b) Bac. Abr. Cov. C.; Bensus v. Guyldey, Cro. Jac. 505.

Cov. A. 3.

(d) 1 Wms. Saund. 230b.

"a wharf and storehouses," and the word in the deed was "storehouse," this was held a fatal variance (e).

Where the action was brought by a lessor, on a covenant with himself, he was not obliged to set out any title (f), but an assignee of the reversion had to set out his title. It was unnecessary to aver the entry of the lessee, but this was usually done. A *proviso* is properly "the statement of something extrinsic of the subject matter of a covenant which shall go in discharge of that covenant by way of defeasance," while an *exception* is "a taking out of the covenant some part of the subject matter of it" (g). Hence a proviso did not need to be stated in the declaration, for it was for the defendant to state the condition going in defeasance of the covenant (h); but not to state an exception was a fatal variance on *non est factum* (i). The assignee of a reversion had to show in the declaration that the reversion was assigned to him *by deed or fine* (k), or it was erroneous; but the assignee of a term could maintain an action on covenants running with the land, even if the assignment to him was only by parol (l).

And so though "the lessee by 29 Car. 2, c. 3, s. 3, must assign his term by deed or note in writing, yet in an action by the assignee of the term against the lessor upon a covenant contained in the indenture of demise the assignee is not bound to state in the declaration that the term was assigned to him by deed in writing" (m). Since 4 & 5 Anne, c. 16, and 11 Geo. 2, c. 19, it became unnecessary to aver *attornment* (n).

Averment.

Averment might be either general or particular. "A *general averment* is in the words '*et hoc paratus est verificare*,' and is the conclusion of every plea in abatement or bar of replications or other pleadings (except declarations or avowries) containing affirmative matter. A *particular averment* is as when the life of tenant for life or tenant in tail is averred" (o).

(e) Hoar v. Mill, 4 M. & S. 470; and cf. 1 Wms. Saund. 233, n. (2), and cases cited.

(f) Whitton v. Peacock, 2 Bing. N. C. 420; 1 Wms. Saund. 233a, n. (2).

(g) 1 Wms. Saund. 234, n. (c).

(h) Elliott v. Blake, 1 Lev. 88.

(i) Tempamy v. Burnand, 4

Camp. 21.

(k) Long v. Nethercote, Cro. Car. 163.

(l) Noke v. Awder, Cro. Eliz. 373.

(m) 1 Wms. Saund. 234, n. (c);

Bellamy's case, 6 Rep. 38b.

(n) Moss v. Gallimore, 1 Doug. 283.

(o) 1 Wms. Saund. 235, n. (8).

If A leases to B for twenty-one years, and covenants at any Breach. time during the life of B upon surrender of the old lease to make a new lease, and after H leases to a stranger, he hath disabled himself and broke his covenant (*p*).

In an action of covenant several breaches might be assigned; but it was otherwise in debt upon an obligation conditional to perform covenants until 8 & 9 Will. 3, c. 11 (*q*).

It was sufficient if the breach was assigned as generally as the covenant (*r*).

Where A covenanted to permit B, his heirs and assigns, to enjoy the rents, &c., of certain lands, and the breach assigned was that A did not suffer B to enjoy the rents, &c., but had received them herself, the breach was held well assigned (*s*). But *non permisit* alone is too general, as some special disturbance or interruption by some act ought to be assigned (*t*).

Accord and satisfaction after covenant broken might be Pleas. pleaded where no certain duty accrued by the deed; but could not be pleaded in bar of an action for subsequent breach of the covenant (*u*), and where a duty accrues by a deed, as a covenant to pay a sum of money, it ought to be avoided by matter of as high a nature (*v*).

Assignment before breach was a good plea by an assignee (*w*). *Expulsion and eviction* was a good plea to an action for rent. *Non infregit conventionem* was a bad plea (*x*), but cured after verdict (*y*). *Nil habuit in tenementis* could not be pleaded by a lessee (*z*), but he might show that his lessor's title had expired (*a*). *Non demisit* cannot be pleaded (*b*). By the plea

(*p*) Sir Anthony Morris's case, 5 Rep. 21; Bac. Abr. Cov. H.

(*q*) Collins v. Collins, 2 Burr. 320, p. 824-5, Lord Mansfield comments on Act.

(*r*) Muscat v. Ballet, Cro. Jac. 369; Bradshaw's case, 9 Rep. 60.

(*s*) Symms v. Smith, Cro. Car. 176.

(*t*) Fraunce's case, 8 Rep. 90, p. 92a; Bac. Abr. Cov. L.

(*u*) Kaye v. Waghorn, 1 Taunt. 428.

(*v*) Blake's case, 6 Rep. 44; Rogers v. Payne, 2 Wils. 376.

(*w*) Pitcher v. Tovey, 1 Salk. 81; Taylor v. Shum, 1 B. & P. 21.

(*x*) Hodgson v. E. India Co., 8 T. R. 278; Pitt v. Russel, 3 Lev. 19; Taylor v. Needham, 2 Taunt. 278.

(*y*) Walsingham v. Lamb, 1 Lev. 185.

(*z*) Taylor v. Needham, 2 Taunt. 278; Palmer v. Ekins, 2 Stra. 818.

(*a*) England v. Slade, 4 T. R. 682; Doe v. Ramsbotham, 3 M. & S. 516; Doe v. Watson, 2 Stark. 230.

(*b*) Taylor v. Needham, 2 Taunt. 278.

non est factum only the due execution of the deed was put in issue, but a variance might be taken advantage of under it (*c*), as might erasure, but not infancy (*d*), or duress.

Where two men are jointly bound, neither can say that the bond is not his deed; he might plead in abatement of the writ if sued alone, but could not plead *non est factum* (*d*). *Performance* might be pleaded either specially or generally. In a negative covenant in affirmance of a preceding affirmative covenant performance might be pleaded generally, but where there was a negative covenant in addition to an affirmative covenant, performance had to be pleaded specially (*e*). *Release* of covenants both before and after breach was a good plea.

Set off had to be pleaded (*f*), and tender before action brought was good (*g*). And the breach might be traversed (*h*). As to traverse of title see *Carvick v. Blagrove* (*i*).

Venue.

The venue of the action was *transitory* between lessor and lessee (*k*), assignee of reversion and lessee (*l*), and lessee and assignee of the reversion (*l*); it was *local* between lessor and assignee of the lessee (*m*), assignee of lessee and lessor, assignee of the reversion and assignee of the lessee, and assignee of the lessee and assignee of the reversion (*n*).

Action of covenant now obsolete.

By the Common Law Procedure Act, 1852 (*o*), no form or cause of action is to be mentioned in the writ (*p*); different causes of action may be joined (*q*); objections by way of special demurrer are taken away (*r*). The present state of the law is governed by the Judicature Acts, 1873 and 1875 (*s*).

(*c*) *Howell v. Richards*, 11 East, p. 641; *Tempany v. Burnand*, 4 Camp. 20.

(*d*) *Whelpdale's case*, 5 Rep. 119.

(*e*) *Laughwell v. Palmer*, 1 Sid. 87.

(*f*) *Oldenshaw v. Thompson*, 5 M. & S. 164.

(*g*) 1 Wms. Saund. 33a, n. (2); *Johnson v. Clay*, 7 Taunt. 486.

(*h*) *Harris v. Mantle*, 3 T. R. 307.

(*i*) 1 Brod. & Bing. 531.

(*k*) *Bulwer's case*, 7 Rep. 2; 1

Wms. Saund. 241, n. (6).

(*l*) *Thursby v. Plant*, 1 Wms. Saund. 237.

(*m*) *Barker v. Damer*, Carth. 182.

(*n*) *Stevenson v. Lambard*, 2 East, 580; 1 Wms. Saund. 241d, n.

(*o*) 15 & 16 Vict. c. 76.

(*p*) S. 3.

(*q*) S. 41.

(*r*) S. 51.

(*s*) 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77.

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